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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Hiram B. Webb, Petitioner,

v.

United States of America, Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for a Writ of Certiorari

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Questions Presented for Review

1. Did the Department of the Interior and the lower courts apply an incorrect test of discovery on an unpatented mining claim?

2. Did the Department of the Interior and the lower courts rely on evidence that was neither reliable or probative in contradiction of federal case law?

Table of Contents

Table of Authorities

Statutes

Administrative Procedures Act, 5 U.S.C. 701 et seq.

28 U.S.C. Section 1254

28 U.S.C. Section 1331

Reported Opinions

United States vs. Webb, Ninth Circuit Court of Appeals, No. 79-3484

United States vs. Webb, Ninth Circuit Court of Appeals, No. 83-1595

United States vs. Webb, DC# CV 77-246 PHX-CAM, Arizona (Phoenix)

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 21, 1983. This petition for certiorari was timely filed within 90 days. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Statement of the Case

Petitioner has and for all times herein mentioned held and worked 16 unpatented possessory lode and placer locations (including Leo #1, #2, #3 and #4, Alta Vista #1, Alta Vista #2, and Turkey Track #3) comprising a large portion of the West half of Section 22 and a small portion of the East half of Section 23, Township 4 North, Range 3 East, G.&S.R.B.&M., Winifred Mining District, Maricopa County, Arizona, subject to the paramount title of the Respondent, United States of America.

The subject mining claims were either located by the Petitioner or his predecessor in interest prior to July 23, 1955, and later amended by Petitioner. Thereafter those claims not located by Petitioner were quit-claimed by quit-claim deeds recorded in the County Records of Maricopa County on June 20, 1961.

The Jack White Mine (also known as

the Eyrich Mine), located on the Leo #1 and #3 claims, produced gold from the late 1800s until closed down by the Roosevelt Executive Order L-208 in 1941. That mine contains a large vein over four feet wide which increases in width and value at depth and contains a gold reserve that could be produced at a profit today. On June 1, 1977, Respondent entered into a Lease with Roland Joseph Higgins, James W. Wood and Lawrence James Boccardo, doing business as J. Mining, to develop, mine and mill the gold ore found in the Jack White Mine.

Part of the mineral lands involved herein was leased to Ronald Linderman on September 8, 1979, and the remainder to Pat Lomkers on approximately the same date. Both leases involved the production of granite and gold. Gold production is presently proceeding from a cyanide plant on the Jack White Mine

dump, as is granite production occurring from the remainder of the mineral lands involved herein.

All public domain in Section 22, Township 4 North, Range 3 East, G.&S.R.B.&M., excepting valid mining claims, was classified as suitable and proper for leases and sale for residential purposes by Classification Order 52, dated August 13, 1956, as provided by the Small Tract Act of June 1, 1938, as amended. All of Petitioner's mineral rights were in existence prior to August 13, 1956. Petitioner submitted a verified statement of his mining claims in the west half of said Section 22 as required by the 1956 reclassification. The claims were later examined by a representative of the United States Bureau of Land Management (hereinafter "B.L.M.") who "clear-listed" the Leo #1 and #3 where the Jack White Mine was located, tacitly admitting that a

discovery of gold existed on these two claims.

On September 25, 1956, after its examination of Petitioner's mining claims in the west half of said Section 22, the B.L.M. initiated contest proceedings (Arizona Contest No. 10,013) against the following lode mining claims owned by the Petitioner: Lora, Minnie, Leo #2 and #4, Alta Vista #1 and #2 and Turkey Track #1 and #3. A hearing was held before a Hearing Examiner on May 27 and 28, 1957. In that hearing, evidence was given by the government that granite was being sold from the mining claim area and veins and iron-staining within the granite pits were sampled for lode gold mineralization.

By decision dated December 23, 1957, the Hearing Examiner declared the Lora, Minnie and Turkey Track #1 lode mining claims "null and void." The Examiner "dismissed" the B.L.M. complaint with

respect to the Leo #2 and #4, Alta Vista #1 and #2, and Turkey Track #3 lode mining claims on the grounds that the B.L.M. had failed to show that there was not a discovery on these claims or that they were invalid. The Examiner found that the B.L.M. Mineral Examiner had failed to sample places on said claims where a witness for the Petitioner testified that valuable deposits of gold and silver had been found. The issue of discovery was tried and the Petitioner continued to produce granite and develop his gold mine. No appeal was taken from the decision of the Hearing Examiner.

In 1963, the Petitioner filed application for mineral patents AR 032789 and AR 034090 for the lode mining claims presently in issue: Leo #1, #2, #3 and #4, Alta Vista #1 and #2 and Turkey Track #3. Two years later, the B.L.M. initiated contests (Contest Nos. AR 032789 and 034090) against the subject

lode mining claims and the pending mineral patent applications, charging that valuable minerals had not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws. Petitioner filed an answer to the B.L.M. contests and a hearing was held before a Hearing Examiner in Phoenix, Arizona, on November 8 and 9, 1966. At the hearing, counsel for the parties stipulated to the admission of all the testimony and exhibits received in the previous hearing on May 27 and 28, 1957. It was also stipulated that the final decision, findings of fact and conclusions of law found pursuant to the 1957 proceeding were admitted in the 1966 hearing.

Additional evidence not presented in 1957 was offered by both parties during the 1966 contest hearing. Petitioner testified at both the 1957 and 1966 hearings. By decision date March 29,

1967, Petitioner's patent applications were rejected by the Hearing Examiner as not encompassing a valuable lode gold mineral deposit. Said Examiner then went one step further and declared these lode mining claims "null and void".

Petitioner timely appealed the decision of the Hearing Examiner to the B.L.M. Branch of Mineral Appeals, Office of Appeals and Hearings, which affirmed the Examiner's decision on January 31, 1969. Petitioner appealed the decision further to the Interior Board of Land Appeals (hereinafter the "I.B.L.A."), Office of Hearings and Appeals, Department of the Interior (I.B.L.A. 70-33). On October 15, 1970, the I.B.L.A. issued its decision affirming the prior decisions, holding the contested mining claims "null and void," and rejecting the Petitioner's mineral patent applications. By decision dated November 6, 1970, the Chief of the Branch of

Minerals declared the contests and mineral applications involving the subject claims closed and authorized refund to the Petitioner of the purchase money submitted with his patent applications.

Petitioner continued producing granite from his mining claims in the West half of Section 22 and continued developing the gold mineral with the expectation that he would develop a paying gold mine from which, at this time, he is producing gold. The lands upon which the subject mining claims are situated were segregated as of April 26, 1973, from futher mineral entry (subject to then existing valid mineral claims) by Classification A-6390, which classified the lands for disposal under the Recreation and Public Purposes Act.

Respondent was served by certified mail with a Notice of Trespass and Notice to Remove Unauthorized Structures from

the B.L.M. on August 28, 1976. Said notice allowed Petitioner forty-five (45) days to comply. Petitioner continued to produce decomposed granite and to develop his gold mining rights, and continues to maintain any structures that are necessary to his mining operation. Petitioner has not been in residence upon the subject lode mining claims since he entered the hospital in 1975.

On March 29, 1977, Respondent filed its Complaint seeking ejectment and damages against the Petitioner. In his answer, Petitioner claimed lawful possession.

Respondent's initial Motion for Summary Judgment was granted by the Court and Petitioner appealed the Court's decision to the U.S. Court of Appeals for the Ninth Circuit (No. 79-3484). Pursuant to the Ninth Circuit's decision of September 8, 1981, and Judge Carl A. Muecke's Order of April 14, 1982,

Respondent filed a second Motion for Summary Judgment and Petitioner submitted his Response and a Cross Motion for Summary Judgment. By an Order (DC#CV 77-246 PHX CAM, Arizona, Phoenix) dated November 9, 1982, Judge Muecke denied Petitioner's Cross Motion for Summary Judgment, stated that Defendant's placer mining rights were not before the Court and granted Plaintiff's Motion for Summary Judgment, voiding Defendant's seven lode mining claims. The matter was once again timely appealed to the U.S. Court of Appeals for the Ninth Circuit (No. 83-1595). The Ninth Circuit upheld Judge Muecke's Order in a Memorandum decision and this appeal follows.

District Court Jurisdiction

The United States District Court for the District of Arizona had jurisdiction over this matter by virtue of the Administrative Procedures Act, 5 U.S.C. Section 701, et seq. and 28 U.S.C. Section 1331, et seq.

Reasons for Allowance of the Writ

1. The Decisions below apply an incorrect test of discovery on an unpatented mining claim.

Hearing Examiner Shepard's decision of March 29, 1967, I.B.L.A. 70-33, the Order of the District Court and the affirming Ninth Circuit Memorandum decision rest upon a misinterpretation of the principles embodied in Castle v. Womble, 19 L.D. 455 (1984) and Chrisman v. Miller, 197 U.S. 313 (1904). At p. 7 of his Decison, Hearing Examiner Shepard states: "The requirements for a discovery of valuable minerals are set forth in the "prudent man" test, Castle v. Womble, 19 L.D. 455 (1984), approved in Chrisman v. Miller, 197 U.S. 313 (1904), and recently reaffirmed in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963) which is:

> "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence

would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

The lode mining claims at issue herein are gold claims and therefore the test of validity applied by Hearing Examiner Shepard is not the correct one. Castle v. Womble, supra, continues on after the Hearing Examiner's incomplete quote to state at 19 L.D. 457:

> "...where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase." For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed

> in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do." (emphasis added)

The above language comprises the test approved by the United States Supreme Court in Chrisman v. Miller, supra., upon which the Hearing Examiner should have based his decision and not the test of economics upon which Mr. Shepard erroneously relied. Immediate profitability is not a requisite of a valid discovery. As Castle v. Womble dictates, the mining laws are designed to give citizens the right to explore and develop valuable mineral deposits.

The test appied by Hearing Examiner Shepard, the I.B.L.A. and the judicial system effectively eliminates the mineral exploration and development industry and contradicts statutory and case law. Petitioner's quotations from Castle v. Womble and subsequent cases clearly describe the protections given the miner for the possession and title of his

mining claim while he is exploring and developing his valuable mineral discovery. In order for the miner to be protected from other claim locators and to maintain his possessory rights granted him by the mining laws, those mining laws:

"...gives to the claimant certain exclusive possessory rights..."

Best v. Humboldt Placer Mining Co., 371 U.S. 334, 337 (1963)

The test which Hearing Examiner Shepard and the courts should have applied is whether a prudent person would expend his time and money in the further exploration and development of a mining claim. Pursuant to this test, the Respondent failed to make out a prima facie case of invalidity in Arizona-032789 and 034090 and the Petitioner proved, by a preponderance of the evidence, that his mining claims are valid. Petitioner's proof was the

culmination of decades of experience with the mining claims, as is described in Hearing Examiner Shepard's Decision beginning at p. 5.

2. The evidence of the Respondent in Arizona Contest Nos. 032789 and 034090 was neither reliable nor probative and Hearing Examiner Paul A. Shepard erroneously relied on said evidence.

A Ninth Circuit Court of Appeals case has set standards for the weight given evidence by adminitrative law judges. That case is Charlestone Stone Products Co., Inc. v. Andrus, 553 F.2d 1209 (1977). While discussing Verrue v. United States, 457 F.2d 1202 (1972), the court in Charlestone Stone described the standards a government witness in a mining contest must conform to:

> "Finally, this Court has in the past refused to credit the testimony of Government witnesses on facts similar to those in a case at bar. In Verrue, supra, this Court affirmed the District Court's reversal of the Secretary's decision invalidating a sand and gravel mining claim for lack of discovery of a valuable mineral deposit. In reaching this conclusion, the Court noted that the

> crucial issue was marketability and that the testimony of the three Government witnesses "sheds no light on that issue" because none of them had been in the area of the mining claim during the crucial period "nor did any one of them have personal knowledge of the sand and gravel market during that time." (emphasis added)

The testimony of the Respondent's witnesses, Miller, Clemmer and Mitcham, contains the same flaws as did that of the government's witnesses in Verrue and Charlestone Stone. These witnesses were briefly acquainted with the mining claims at best, indeed, Mr. Clemmer never visited the claims. See Hearing Examiner Shepard's Decision at p. 5.

In contrast, Petitioner Hiram Webb's expertise includes many years of actually mining the Jack White Mine and other lode mines. Decision of Hearing Examiner Shepard at p. 6. Petitioner's witnesses expertise included both formal education and practical experience which led to their opinion that the mining claims are a worthy mineral target.

3. Hearing Examiner Paul A. Shepard and the Interior Board of Land Appeals misapplied the principles of United States v. Coleman, 390 U.S. 599 (1968) and Verrue v. United States, 547 F.2d 1202 (1972).

At p. 8 of his decision, Hearing Examiner Shepard described the criteria he used in deciding the validity of the mining claims:

> "The minimal amount of gold that must be found upon a claim in order to constitute a discovery is dependant upon whether, under the circumstances, a prudent man knowing the facts revealed by the mineral exploration and work done would be justified in expending further time and money with a reasonable expectation of developing a valuable mine. This expectation must relate to the development of a mine and not simply to further exploration work to determine whether there is sufficient mineralization. United States v. Lawrence R. Dowell, et al., A-30614 (November 21, 1966)".

This practice flies in the face of United States v. Coleman, 363 F.2d 190 (1966). That case discusses the criteria that should be used in testing unpatented mining claims:

> "This, of course, is not to suggest that the Foster v. Seaton guidelines of accessibility, bona fides in development, proximity to market and

existence of a present demand and other factors are irrelevant as evidence bearing upon the ultimate issues of good faith and existence of a valuable mineral deposit. But these ultimate issues should be resolved in each case from the evidence as a whole and it is improper, in our view, to convert one aspect of relevant evidence into an absolute legal requirement with respect to a certain class of minerals in derogation of a time-honored, judicially approved test of "value" applicable to all locatable minerals. . . .In his final decision, the Deputy Solicitor remarked that the Appellant did not make the required showing of marketability as to all claims. He said: "Whether expenditures for improvements on other claims may or may not be credited to these (disallowed) claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims." The Castle v. Womble prudent man test does not require such a showing, although such evidence is, of course, relevant proof under the issue as to each separate mining claim. The Castle v. Womble test implies a forecast of the reasonably anticipatable future. . .We have found no case authority on the subject of whether the calculated value of a locator's labor in developing the property should be charged as an expense in determining profitability"." (emphasis added)

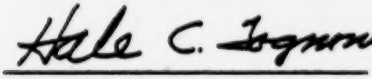
The above citation is valid despite the overruling of the 9th Circuit decision in United States v. Coleman, 390

U.S. 599 (1968). The Supreme Court overruled the 9th Circuit because of bad faith on Coleman's part; therefore, the elements of the marketability test described by the 9th Circuit are still valid. Hearing Examiner Shepard misinterpreted and misapplied the Coleman case. The prudent person test has sufficient flexiblility to allow a miner to explore and develop a mine if a reasonable possibility of success exists. Charlestone Stone Products Co., Inc. v. Andrus, 553 F.2d 1209, 1215 (1977).

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,



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ENTRY OF APPEARANCE
and
CERTIFICATE OF SERVICE

I certify that I am a member of the Supreme Court of the United States Bar; that I am appearing for the first time on behalf of Hiram B. Webb, Petitioner in this matter and that three copies of the foregoing Petition for Writ of Certiorari have been served upon all appropriate parties by depositing the documents in a United States post office, first-class postage prepaid, this 16th day of February, 1984, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Department of the Interior
18th and C. Streets, N.W.
Washington, D.C. 20240

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APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Office of the Hearing Examiner
305 Construction Center Building
4700 North Central Avenue
Phoenix, Arizona

December 23, 1957

DECISION

UNITES STATES OF AMERICA, Contestant	:	CONTEST NO. 10,013 : Involving : the Lora, : Minnie, : Victor, Leo : Nos.2 & 4,
v.	:	Turkey Track : Nos. 1 & 2, : Lode Mining : Claims : situated : in W , Sec. : 22, : T. 4 N., R. : 3 E.,
H. B. WEBB, Contestee	:	G&SRM, : Arizona

Lora, Minnie, Victor, and Turkey Track No. 1 Lode Mining Claims

HELD NULL AND VOID

Contestant's Charges Against the Leo No.2, Leo No.4, Turkey Track No.3, Alta Vista No. 1 and Alta Vista No.2 Lode Mining Claims

DISMISSED

On September 25, 1956, the contestant filed the following charges against the above named lode mining claims:

1. That the lands embraced within the claims are nonmineral in character.

2. That minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

On October 30, 1956, the contestee filed an answer denying each of the charges and alleging that the said mining claims are highly mineralized and that minerals have been found within the limits thereof in sufficient quantities to constitute a valid discovery and permit an economic exploitation thereof.

A hearing was held before the undersigned Examiner in Phoenix, Arizona, on May 27, 1957. Otto Aho, Esq., Office of the Solicitor, U.S. Department of the Interior, Reno, Nevada, appeared for the contestant, Albert H. MacKenzie, Esq., and Foster G. Mori, Esq., appeared on

behalf of the contestee.

The parties stipulated that the Victor Lode Mining Claim be included as a contested claim in this proceeding. This claim encompasses the same identical area as the Lora Lode Mining Claim.

Donald F. Reed, Valuation Engineer for the Bureau of Land Management, after having been duly qualified as a mining engineer, testified that he examined the subject lode mining claims on March 2, 1956, and again on April 19, 1956. On the latter date, he was accompanied in his examination by one Felix Cosper, who was then employed by the contestee.

The claims are situated on the eastern slope of the Union Hills, approximately six miles north of Cactus, Maricopa County, Arizona. The Union Hills consist of granite, probably pre-Cambrian in age, and the flat area surrounding those hills consists of erosional products of this granite,

mostly decomposed granite. Occasional quartz veins are found running through the granite complex. He identified the exact location of each of the claims by locating the corners thereof on the ground.

On the Lora and/or Victor Lode Mining Claim he found partially decomposed granite material and very little outcrop of bedrock. He found only one opening on this claim, a pit 4 feet wide, 12 feet long, and approximately 7 feet deep. There was no evidence of mineralization other than a few cracks and seams in the rock which contained some iron stain. The assay report of a sample cut across a 24 inch width on the south face of this pit showed a trace of gold.

On the Minnie Lode Mining Claim, Mr. Reed found one pit 4 to 6 feet wide, 12 feet long, and 6 feet deep. The material in this pit was caliche. He saw no vein

or sign of mineral in the pit. He cut a sample from an outcrop at another point on the Minnie claim. The assay report of this sample showed a trace of gold.

On the Turkey Track No. 1 Lode Mining Claim he found two workings. The surface material had been scraped from an area approximately 200 feet long and 60 feet wide, ranging from 3 to 8 feet in depth. It was his opinion that decomposed granite had been removed from this pt. There was a second pit 4 feet by 12 feet by 5 feet deep all in caliche. The assay report of a chip sample taken from the larger pit showed .01 ounce of gold per ton.

He found no workings on the Turkey Track No.3 Lode Mining Claim. The assay report of a sample taken from an outcrop consisting of several quartz stringers or veins showed.05 ounce of gold per ton.

He found one excavation 6 feet by 12 feet by 7 feet deep on the Alta Vista No.

1 Lode Mining Claim. A sample taken from a 1-inch quartz seam exposed by this excavation had an assay value of .01 ounce of gold per ton.

On the Alta Vista No. 2 Lode Mining Claim he found only one pit which was 12 feet by 8 feet by 8 feet in depth. The assay report of a sample taken from a 3-inch quarz seam showed .18 ounce of gold per ton.

On the Leo No. 2 Lode Mining Claim he found an old abandoned shaft sunk on a vein in a granite formation. He took a sample from a 6-inch quarz vein in the shaft approximately 5 feet below the surface. The assay report of this sample showed a trace of gold.

He was shown an old partially caved-in incline shaft on the Leo No. 4 Lode Mining Claim. The shaft was 4 feet by 6 feet in section, caved in to a depth of about 10 feet. He took a sample from a 2-inch quartz vein about 3 feet below the

collar of the shaft. The assay report of this sample showed .22 ounce of gold per ton.

On cross examination, he stated that "there are quite a few portions of these claims I did not see."

It was his opinion, based upon his examination of the claims involved in this proceeding, that there was not evidence of minerals on any of the claims of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a prospect of success in developing a valuable mine. It was also his opinion that the lands embraced by the said mining claims were nonmineral in character.

Mr. P. H. Lund, witness for the contestee, having been duly qualified as a mining engineer, testified that he examined the mining claims involved in this contest in November 1956.

He took a sample from a 16 to 18 quartz vein on the Alta Vista No. 1 Lode Mining Claim, the assay report of which showed .75 ounce of gold per ton. A sample taken from the northeast corner of this claim showed .24 ounce of gold per ton.

From a small vein at the bottom of an 8 foot pit on the Alta Vista No.2 he took a sample which showed .60 ounce of gold per ton. From an open cut on the Leo No. 2 he took a sample which showed .34 ounce of gold per ton.

On cross examination, Mr. Lund stated that the veins on the Alta Vista No. 1 varied from 8 inches to 24 inches wide. He stated that the gold values in the sample taken from the Alta Vista No. 1 "would be sufficient indication to prospect further. Not mine but prospect."

It was his opinion that the lands embraced by Alta Vista No. 1 and No. 2,

Leo No. 2 and No. 4, Victor and Turkey Track No. 3 are highly mineralized and that such minerals are in sufficient quantities to permit economic exploitation.

Mr. William P. Crawford, witness for the contestee, after having been duly qualified as a mining engineer, testified that he took samples from the subject mining claims on May 4, 1957, and again on May 15 and 16, 1957.

From the Alta Vista No. 1 on the 4th of May, he took five samples which had theoretical assay values in gold ranging from .01 to .24 ounce per ton. On the 26th of May 1957, he took two more samples from this claim, one of which was taken from a 7-inch vein of quartz exposed for a length of 3 to 4 feet, which showed 1.16 ounces gold per ton, and the other was taken from an 8-inch vein of quartz exposed for about 2 feet which showed .92 ounce of gold per ton.

Each of these latter samples was taken from an outcrop which had not been previously prospected. He stated that the two samples were definitely material worth prospecting and could be mined. On cross examination, he stated that he would recommend further exploratin before spending money sinking a shaft or drifting drifts on the surface exposures of the veins from which the two samples were taken. He described these samples as minable material, "provided there is enough of it".

A sample was taken from a 14 inch quartz vein exposed for about 20 feet in an open cut on the Leo No. 4. This sample showed .28 ounce of gold per ton. A second sample taken from a 4-inch quarz vein exposed about 7 feet below the collar of a 20 food incline shaft on the Leo No. 4 showed .80 ounce gold per ton.

From a 10 inch band of quartz veinlets exposed at the portal of a 32

foot incline shaft on the Leo No 2, he took a sample which showed .30 ounce of gold per ton. A sample taken from the same vein about 8 inches wide at the bottom of the shaft showed .68 ounce of gold per ton.

On his first examination, he took two samples from the Alta Vista No. 2, each of which showed an assay value of .01 ounce of gold per ton. On his second examination, he took three more samples from this claims. One of these samples showed an assay value of .01 ounce of gold per ton. Another sample taken from a 4 inch quartz vein exposed for approximately 4 feet showed .28 ounce of gold per ton. The third sample, taken from a 6 inch quarz vein exposed for a length of 5 feet, showed .49 ounce of gold per ton. There were no workings on the veins from which the latter two samples were taken.

A sample taken from the Turkey Track

No. 1 showed .01 ounce of gold per ton. Two samples which Mr. Crawford took from the Victor showed .01 ounce of gold per ton. He took no samples from the Minnie claim.

A sample taken from an 8 inch quartz vein exposed for 12 feet in a bulldozer cut on the Turkey Track No. 3 showed 4.40 ounces of gold per ton. A sample of the granite taken from the walls of this vein showed .02 ounce per ton in gold.

It was his opinion that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on the group of contested claims.

All of the samples taken by the engineers representing the contestee were assayed for their silver content. With the exception of a sample taken from the Turkey Track No.3, the silver content of the samples was a negligible ounce, or

less, per ton.

Mr. Webb, the contestee, testified that he acquired the contested claims and other adjoining claims, early in 1956, for the sum of $12,000.00 on-half of which has been paid to the seller. On cross examination, he stated that it was his intention to work the contested claims from an adjoining claim, the Leo No. 3 known as the Jack White Mine, which was not contested.

II

Under the mining laws, "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." (Rev. Stat. Sec. 2320, 30 U.S.C. 23. 1952.) The Department defined the term "discovery" in Castle v. Womble, 19 L.D. 455, 457 (December 5, 1984), as follows:

> * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable propect of

success in developing a valuable mine, the requirements of the statute have been met."

This definition was affirmed by the United States Supreme Court in Chrisman v. Miller, 197 U.S. 313, 324 (1904), and in Cameron v. United States, 252 U.S 450 (1920).

In Jefferson-Montana Copper Mines Company (1912), 41 L.D. 320-323, the Department defined a valid discovery as follows:

"After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:

1. There must be a vein or lode of quartz or other rock in place;

2. The quartz or other rock in place must carry gold or some other valuable mineral deposits;

3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in an effort to develop a valuable mine."

The contest having been initiated by

the Bureau of Land Management, it has the burden of proving the charges with sufficient evidence to make a prima facie case, and thereupon it is incumbent upon the contestee to refute the charges by a preponderance of the evidence. United States v. M. w. Mouat, et al., 60 I.D. 280; United States v. Strauss, et al., 59 I.D. 129.

III

There is no evidence in the record of the discovery of a lode deposit of valuable mineralized rock in place, sufficient to warrant a prudent man to invest his time and momny in the hope of developing a paying mine, within the limits of the Lora, Victor, Minnie, and Turkey Track No. 1 Lode Mining Claims. I find that the contestant has established the truth of the charges filed against these claims by a preponderance of the evidence.

Accordingly, the Lora, Victor,

Minnie, and Turkey Track No. 1 Lode Mining Claims are hereby declared null and void.

With respect to the other mining claims involved herein, there is no positive evidence in the record that the lands embraced thereby are valuable for other than mining purposes. The contestee apparently purchased these and other adjoining claims in good faith for mining purposes.

Each of the mining engineers who examined these claims found gold and silver in bearing veins of rock in place. The issue to be determined is whether the gold and silver values which have been found are sufficient to warrant a prudent man to invest his time and money in the hope of developing a paying mine. The burden of proving the charges rests with the contestant.

None of the mineral values reflected in the assay reports of samples taken

from the claims by Mr. Reed are sufficient to warrant any further development of these claims. However, samples taken from other places on the said mining claims by Mr. Lund and by Mr. Crawford reflected much greater values in gold and silver. Mr. Crawford's opinion that some of the veins of rock in place from which these samples were take were "mineable" was not refuted by the contestant. The exposed veins from which the contestee's more valuable samples were taken were not sampled by the contestant. Although the mineral values on the claims are spotty, there is not evidence that the samples taken by the contestee were not representative of the veins from which they were taken.

I find that the contestant has failed to establish, by a preponderance of the evidence, the truth of the charges filed against those claims not hereinabove declared null and void.

Since the contestant's charges against the Alta Vista No. 1, Alta Vista No.2, Leo No. 2, Leo No. 4, and the Turkey Track NO. 3 Lode Mining Claims are not supported by a preponderance of the evidence, those charges must be, and they are hereby, dismissed.

The right of appeal to the Director, Bureau of Land Management, is allowed in accordance with information in the enclosed For 4-1364, a copy of which is also enclosed.

Rudolph M. Steiner
Hearing Examiner

Enclosures 2

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of the Hearing Examiners
P.O. Box 21-4215
Sacramento, California 95821
March 29, 1967

DECISION

United States of America, Contestant	:	Contest No. 032789, 034090 Involving the Leo Nos. 1, 2, 3 & 4, Alta Vista Nos. 1 and 2. and Turkey Track No. 3 Lode Mining Claims, Embraced Within Secs. 21 and 22, T. 4 N., R. 3 E., SRM, Maricopa County, Arizona.
v.	:	
H. B. WEBB Contestee	:	

MINING CLAIMS DECLARED NULL AND VOID
PATENT APPLICATIONS REJECTED

I N T R O D U C T I O N

The Bureau of Land Management, United States Department of the Interior, initiated adverse proceedings against the mining claims identified above and the claimant thereof, charging and alleging as follows:

"Valuable minerals have not been found within the limits of the Leo Nos. 1, 2, 3, 4, Alta Vista Nos. 1 and 2, and Turkey Track No. 3 lode mining claims, as to constitute a valid discovery within the meaning of the mining law."

Notice of the charges against the claims was properly served on the contestee and a timely answer was filed.

A hearing was held in Phoenix, Arizona, on November 8 & 9, 1966, pursuant to the department of the Interior Hearings Procedures (43 CFR, Part 1950) before the undersigned Hearing Examiner to determine the truth of the charge alleged by the contestant.

At the hearing, an appearance on behalf of the United States was made by Mr. L. K. Luoma and Mr. Fritz Goreham, Field Solicitors, Department of the Interior, Phoenix, Arizona. The contestee was represented by Albert H. MacKenzie, Attorney at Law, Phoenix, Arizona.

BACKGROUND STATEMENT

On September 25, 1956, the Bureau of Land Management brought contest proceedings against the Lara, Minnie, Leo Nos. 2 and 4, Turkey Track Nos. 1 and 3, and the Alta Vista Nos. 1 and 2 lode mining claims and the then claimants, Rachelle Lara Laundrault and H.B. Webb. Pursuant to this proceeding, a hearing was held on May 27 and 28, 1957, before a hearing examiner. It was stipulated by the parties at the hearing that H. B. Webb was the sole owner of these claims. By decision of December 23, 1957, the Hearing Examiner declared the Lara, Minnie, Victor, and Turkey Track No. 1 claims null and void. He dismissed the charges against the Leo Nos. 2 and 4, Turkety Track No. 3, and the Alta Vista NOs. 1 and 2 lode claims. Although he dismissed the charges against these five claims, the Hearing Examiner did not declare them valid.

Subsequent to the issuance of the decision of December 23, 1957, Mr. Webb filed applications for mineral patents 0327889 and 034090, including the Leo Nos. 1, 2, 3, and 4, Alta Vista Nos. 1 and 2, and Turkey Track No. 3 lode mining claims.

TESTIMONY

Counsel for the contestant and contestee stiplated to the admission in this proceeding of all of the testimony and exhibits received in the previous hearing of May 27 and 28, 1957. It was also stipulated that the final decision and findings of fact and conclusions of law found pursuant to the previous hearing be admitted in this hearing.

Charles K. Miller, mining engineer for the Bureau of Land Management, testified on behalf of the contestant. Mr. Miller examined the claims in issue on March 16, 17 and 18 1965, and on October 20, 24, and November 4, 1966.

The claims are approximately 15 to 18 miles from Phoenix and lie on the eastern flank and southern part of Union Hills.

The geology in which these claims are located consists primarily of older Pre-Cambrian granite. During the examination, several quartz veins and quartz stringers were observed on the subject claims. Also there was a dike that trended in a general northwest direction on the eastern edge of the Leo Nos. 1 and 2 claims.

Mr. Miller's inital examination of the Turkey Track No. 3 claim was made by him alone on March 17, 1965, at which time two samples were taken. He took these samples from places pointed out to him the previous day by Joe Webb, son of the claimant. The first of these samples, identified as "TT 3D-A" was a channel cut across a quartz vein. THis vein had considerable ironstaining and was highly altered. The second sample

taken from some altered material was a channel sample designated as "TT 3D-B". There was no definite vein from which this sample was taken. On October 20, 1966,, Mr. Miller took two additional samples on the Turkey Track No. 3 claim. The first of these samples was designated "TT 3D-C" and was a channel sample taken across an altered, highly siliceous zone. The second of these samples was designated "TT 3D-D and was cut across a siliceous altered quartz vein. This quartz vein was 6 inches wide. These four samples were taken in the same general area on the Turkey Track No. 3 claim. The mineralization in this area is described as highly altered siliceous vein material and the vein from which he took the samples varied in width from 6 to 8 inches. On contestant's exhibit No. 3, there are shown workings Nos. 2, 3, and 4. Mr. Miller noticed quartz float adjacent to these workings

and vein material in place.

On March 17, 1965, Mr. Miller cut two samples on the Alta Vista No. 1 claim, AV-1-D-A and AV-1-D-B. Sample AV-1-D-A was a channel cut, taken across an altered zone that appeared to be localized extending two to three feet on either side of the sample point. Sample AV-1-D-B was also a channel cut and was taken across the same altered zone. An additional sample AV-1-D-C, was taken on March 30, 1965, across altered granite. These samples were taken from one particular locality which represents one exposure of mineralized material. There was not excavation at this point except that some decomposed granite had been removed to expose the altered zone. An iron-stained fractured quartz vein was exposed at this point which was avbout 4.8 inches wide and 4' long. There were quartz stringers exposed in other workings on the Alta Vista No. 1 claim.

These workings were not sampled.

Mr. Miller's original examination of the Alta Vista No. 2 claim was Mr. Miller's original examination of the Alta Vista No. 2 claim was on March 16, 1965. On that date, Mr. Joe Webb pointed out the discovery point on this claim from which Mr. Miller cut a chip sample from the bottom of a dozer cut. The quartz vein from which the sample was taken was 2.4 inches thick. This sample is designated "AV-2-D". Sample "AV-2-A" was taken by Mr. Miller on October 20, 1966. This sample was taken across an iron-stained silicous zone of granite. On the same day, Mr. Miller cut sample AV-2-B, which is a channel sample taken across a 6" quartz vein. He again sampled the Alta Vista No. 2 claim on November 4, 1966 and this sample is identifiied as "Alta Vista-2-B-1."

Another sample, "AV-2-B-2", from the same claim, was a chip sample taken from

the altered quartz vein. Sample "AV-2-3" was cut from the same claim. Other than the sample points on the Alta Vista No. 2 claim, Mr. Miller observed some quarz stringers and quartz veins that had a considerable amount of iron staining associated with them. The quartz veins were less than a foot wide and were six to eight feet long.

Mr. Miller's original examination of the Leo No.2 claim was with Mr. Joe Webb on March 17, 1965. At that time he took channel sample "L-2-A" from across a one foot wide quartz vein exposed in a pit. He did not know the length of the quartz vein but it was exposed throughout the depth of the pit which was four feet.

Two additional samples, "L-2-D-A" and "L-2-D-B", were taken from the inclined shaft on the Leo No. 2 claim. The inclined shaft is 34 feet long, 4 feet wide and 6 feet high.

An examination of the Leo No. 1

claim was made on March 17, 1965, with Mr. Joe Webb. On that day, Mr. Webb pointed out to him the discovery point on this claim and the next day he took two samples from that point which is an inclined shaft. This shaft was 15 feet long, 9 feet wide and 6 feet in height. The first sample, "L-1-D-A", was a chip sample across the quarz vein. The second sample, "L-1-D-B", also a chip sample, was taken on the south wall across the working from the sample point "L-1-D-A." Vein material only was taken in these samples. Sample "L-1-D-2" was a chip sample. A further sample, "L-3-B" was taken across an altered zone. One sample, "L-4-D", was taken from the Leo No. 4 claim from the discovery cut pointed out by Mr. Joe Webb. This was a surface working, and there was exposed a discontinuous, highly siliceous, granitic vein material.

The values of the samples taken by

the contestant are shown by the assay certificates, contestant's exhibits 19 through 29. There are shown on contestant's exhibit 4 the locations from where he took his samples and by his oral testimony, he described in detail when and how he took the samples. These samples ranged in value from .2 ounce per ton silver for a value of .25 per ton to 4.3 ounces of silver for a value of $5.37 per ton. The range of the gold values is from a trace to .34 ounce per ton for a value of $11.90 per ton.

The contestant presented considerable testimony in regard to the cost of mining. There was intruduced in evidence contestant's exhibit 38 which is bulletin 164, a pamphlet called "Exploration and Development of Small Mines" by Harry E. Krumlauf of the Arizona Bureau of Mines.

From this exhibit and other publications, Mr. Miller testified that

he had arrived at a conclusion as to the cost of mining this property. Contestant's exhibit 31 is a summary prepared by Mr. Miller of mining costs, transportation rates and base treatement charges.

Mr. Luther S. Clemmer, a mining engineer, testified on behalf of the contestant. Mr. Clemmer agreed with Mr. Miller's conclusions in regard to his compilation of mining costs.

Mr Robert T. Mitcham, a mining engineer, testified on behalf of the contestant. Mr. Mitcham testified that he had been on property including these mining claims once and that he agreed with Mr. Miller's conclusions in regard to mining costs. He described the "milling set-up" existing on the Leo No. 3 claim. There is a conical-shaped bin and a cylinder that sits in bearings to rotate. The cylinder is about three to three and one-half feet long and three to

three and one-half feet in diameter. It has no liners and if it were to be used as a grinding mill, it has no housing on the discharge end to catch the material as it comes out of the mill. It has no feeder to enter material in the mill and it has no power. The mill is of an experimental nature and, according to Mr. Mitcham, it is one man's idea of what probably a bell or tube mill is. He feels it would not be satisfactory as an operational piece of equipment.

Mr. William P. Crawford, a mining engineer, testified on behalf of the contestee. Mr. Crawford examined these contested claims in 1957 and testified at the previous hearing on May 27 and 28, 1957. In October 1966, Mr. Crawford re-examined the claims. He found that considerable material had washed down on the Turkey Track No. 3 claim since he was there in 1957. He discribed in detail the improvements and work done by Mr.

Webb on these claims.

Mr Crawford took five samples from the Leo Nos. 1, 2 and 3 claims and two samples from the Alta Vista Nos. 1 and 2 claims. Sample No. 1 is a composite cutting from the six-foot drill hole on the Leo No. 3 claim. These cuttings were collected from a drill hole six feet deep and were drilled on the bench bull-dozed south of the Jack White shaft and the bull-dozing exposed a vein 14 inches wide. He directed Mr. Webb to drill a hole with a wagon drill, which he did. Mr. Crawford collected the cuttings.

Sample No.2 was collected on the Alta Vista No. 2 claim. It was collected from quartz stringers exposed on the side hill. The third sample was taken from the Alta Vista No. 1 claim from quartz stringers which range from one to three inches in thickness, but there are a number of them so there is an aggregate zone of about 14 inches.

He cut the sample across the stringers and no wall rock was taken. Sample No. 4, shown on contestee's exhibit "E", was taken from the Leo No. 1 claim from quartz outcroppings. Sample No. 5, shown on exhibit E, was taken from a quartz vein exposed in an opening made in the side of the hill on the Leo No. 2 claim. The three samples shown on contestee's exhibit "F" were taken by Mr. Crawford from the Turkey Track No. 3 claim. He found a vein of iron-stained siliceous material sixteen inches wide and twelve feet long and the No. 2 sample, shown on exhibit "F", was taken from that vein. The Nos. 1 and 3 samples as shown on exhibit "F" were taken from the walls on either side of this vein.

Mr. Crawford described in detail the topography of the land within the claims; the rocks, boulders, etc. and the method of mining the claims, if he owned them. According to Mr. Crawford, this would be

a small operation with no superintendent mine manager or mine foreman. He thinks the place to start mining would be on the Alta Vista No. 1 mining claim. He believes that with the information he now has he could mine the Alta Vista Nos. 1 and 2 and the Leo Nos. 1, 2, 3 and 4, because he said, "I know where the ore is on those particular claims" (tr. 256). However, on the Turkey Track No. 3 claim he would require more prospecting.

Mr. Crawford described the method of mining he would employ and the equipment he would need. He stated that to start with he could get by with two men, himself and one other.

Mr. Hiram B. Webb testified on his own behalf. Mr. Webb described the sampling he did from the Leo No. 3 claim. He also described the equipment he has that is suitable for milling. He has a front-end loader, a wagon drill, a compressor with two-twenty capacity. He

has a ten-wheeler dump truck, a half-yard P. & H shovel for hard digging, a 38 horsepower diesel engine to "pull the mill when it is ready; a table to separate the gold from the concentrate." He also has a mill that he built with a classifier to classify the ore as it runs. He also built roads with a D-8 cat from one claim to another and an access road at a cost of between $2800 to $3000. Excluding the cost of the roads, Mr. Webb estimates that he has spent between 11 and 12 thousand dollars on these claims. Mr. Webb has not sold any minerals from these claims because he has not been ready for the mill. He started to install the mill about three or four years ago so that the ore could be milled without a smelter. When the mill is completed he expects it will run ten tons in an eight hour shift. Mr. Webb intends to begin his operating on the Leo No. 3 claim (formerly the Jack

White claim) and he thinks he can process 8 tons a day (8 hours) by himself with the aid of a power shovel. By using the roads he has built in and around these claims, Mr. Webb testified that he could deliver 5 tons of ore from the Alta Vista No. 1 claim to the mill located on the Leo No. 3 claim in an 8 hour day. In the beginning of his operations, however, he would do no mining on the Alta Vista No. 1 claim until more development work had been done. Mr. Webb believes he has a valid mine because during the last depression, he carried $15 a ton ore off the south mountains for two years and that gave him a living. He testified, "I fed the family with that" (tr. 327).

The values of the samples taken by the contestee are shown by the assay certificates, contestee's exhibits D, E, F and G.

Since, by stipulation of the parties, the testimony at the previous

hearing held in 1957 has been accepted and made a part of this hearing, it may be well to examine some of the pertinent parts of that testimony.

Mr. P. H. Lund, a registered mining engineer in Arizona, testified on behalf of the the contestee. He explained that his samples taken across the vein materials were representative samples of the vein that was in sight and that is all. He could not get into the shaft on the Leo No. 3 claim. He could not examine these claims at depth. Consequently, his conclusions are based on examination of vein outcroppings visible on the surface. From his examination of the seven claims, Mr. Lund concluded that there is sufficient showing for further prospecting, but not to mine.

Mr. William P. Crawford, a registered professional mining engineer, testified on behalf of the contestee.

Mr. Crawford's examination of the claims was very similar to that of Mr. Lund with practically the same results. He recommended further exploration to Mr. Webb before setting up a small plant.

Mr. H. B. Webb testified on his own behalf. His testimony at the present hearing was much the same as his testimony in the 1957 hearings. He intends to begin mining on the Leo No. 3 claim until it is worked out, then continue working the other claims after further prospecting.

D I S C U S S I O N

The requirements for a discovery of valuable minerals are set forth in the "prudent man" test, Castle v. Womble, 19 L.D. 455 (1894), approved in Chrisman v. Miller, 197 U.S. 313 (1905), and recently reaffirmed in Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963) which is:

> "Where minerals have been found and the evidence is of such a character

> that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."

In applying this test, the United States Supreme Court made it clear that evidence merely showing a "possibility" that the land contained mineral sufficient to make it "chiefly valuable therefore" is not enough. Chrisman v. Miller, supra.

The minimal amount of gold that must be found upon a claim in order to constitute a discovery is dependent upon whether, under the circumstances, a prudent man knowing the facts revealed by the mineral exploration and work done would be justified in expending further time and money with a reasonable expectation of developing a valuable mine. This expectation must relate to the development of a mine and not simply to further exploration work to determine

whether there is sufficient mineralization. United States v. Lawrence R. Dowell, et al., A-30614 (November 21, 1966).

A valid discovery under the mining laws required more than a finding of mineral indications that would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists on the claim. United States v. Frank J. Miller, 59 I.D. 446 (1947); United States v. John L. Cooper et al., A-30267 (May 11, 1965). The Department has clearly distinguished exploration and development as they relate to discovery under the mining laws. Exploration work is that which is done prior to discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found, it is often necessary to do further exploratory work to determine whether those minerals have

value, and where the minerals are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows that this can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. United States v. Edgecumbe Exploration Co., Inc., A-29908 (May, 1964); United States v. Henault Mining Company, 73 I.D. 184, A-30540 (June 15, 1966).

There is very little testimony as to reserves on any of the claims. In the hearing held in 1957, Mr. Webb was asked, "What is your intention with respect to these lode mining claims before this contest was filed?" He answered, "Well, we are going to develop the old mine, find where the veins went, and try to

connect to other veins, to the ones that paid off" (tr.218, 1957 hearings). In the ten years that have elapsed since the 1957 hearing, it appears from the testimony that no effort has been made to connect any veins, nor has any development work been done. The "old mine" he referred to was the Jack White mine which is now the Leo Nos. 3 and 4. There is no testimony showing the length of each vein found. The assay certificate submitted by the contestee shows values of from $.25 to $.87 per ton silver and from $1.40 to $87.50 per ton gold. The sample showing a value of $87.50 per ton was taken from cuttings on the Leo No. 3 claim. On this claim a vein was found 14" wide, from which these cuttings were taken. The two best samples taken by the contestant from the Leo No. 3 claims showed values of $.52 per ton siver and $11.90 per ton gold and $.50 per ton silver and $9.10 per ton

gold. Mining at a minimum width of 3 feet, the mining of a 14 inch wide vein would decrease the value of the ore (tr. 345).

I think it is fair to state that at one time, prior to 1928, the Jack White claim (now Leo Nos. 3 and 4 claims) may have been a valuable mine, since $10,000 worth of gold was extracted therefrom prior to 1928. However, no mining has been done on any of these claims by Mr. Webb who has owned them since 1956. He has realized no money from any of these claims since he has owned them and there still appears to be more prospecting work needed.

Labor costs must be considered in determining whether a mining operation has a reasonable prospect of success. The contestant presented considerable evidence as to the cost of mining which would leave very little room for profit, if any. (See exhibits No. 31, 32, 33 and

38). However, Mr. Webb had indicated that by placing a mill on the Leo No. 3 claim, he will mill his own ore and conduct the operation by himself and one other person. There is no reason to treat the value of the labor of a mining claimant any differently from that of one he might hire; either one must be taken into consideration in determining the likelihood of a profitable venture being established. United States v. Vernon O. and Ina C. White, A-30460 (December 3, 1965). However, the mill has not yet been constructed on the claim even though it was started some 3 or 4 years ago. Apparently, he obtained his belief tha considerable gold still remians in the Leo Nos. 3 and 4 claims (formerly the Jack White claim) from information he had obtained from some source, but not brought out at the hearing. This information, that any ore remains in these claims, is not conclusive. He has

indicated that there may be enough ore remaining on these claims (Leo Nos. 3 and 4) to last for a period of two years. However, there is not conclusive evidence that this is true.

After careful consideration of the testimony given in the present hearing 1957, particularly the nature of the mineral deposit, its quality and quantity and the estimates of the cost of mining, I am of the opinion that the contestee has not shown by a preponderance of the evidence that a prudent man would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on these claims. The contestee does not claim to have found a deposit which in itself has value for mining purposes; only that the finding of some mineral value justifies further expenditure in time and money in exploring for deposits which may

reasonably be expected to be found. Since the contestee has not shown that he has made a discovery of a valuable mineral deposit within the limits of the contested cliams, as prescribed by the mining laws, the Leo claims Nos. 1, 2 , 3 and 4, Alta Vista Nos. 1 and 2, and Turkey Track No. 3 lode mining claims are hereby declared null and void and the patent applications are rejected.

RIGHT OF APPEAL

This decision becomes final thirty (30) days from its receipt unless an appeal to the Director, Bureau of Land Management, is filed. There must be strict compliance with the regulations in 43 CFR, part 1840. See enclosed Form 2137. If an appeal is taken, it must be filed in the Office of the Hearing Examiners, P.O. Box 21-4215, Sacramento, California, 95821. The amount of the filing fee will be $5.00 for each claim for which the appeal is taken. The

adverse party to be served with a copy of the appeal is: L. K. Luoma, Field Solicitor, U.S. Department of the Interior, Arizona Title Building Annex, 135 N. 2nd Avenue, Phoenix, Arizona 85003.

Paul A. Shepard
Hearing Examiner

Distribution attached

BUREAU OF LAND MANAGEMENT DECISION

(January 31, 1969)

Decision Affirmed

Mr. H. B. Webb has appealed from the Hearing Examiner's decision dated March 29, 1967, determining the above-identified mining claims to be null and void for failure to show a discovery of a valuable mineral deposit within the limits of the claims and rejecting the patent application for the claims.

By decision dated December 23, 1957, a hearing examiner dismissed a complaint, Arizona Contest No. 10013, against the Leo Nos. 2 and 4, Turkey Track No. 3, and Alta Vista Nos. 1 and 2 lode claims for the reason that the Bureau had failed to show that there was not a discovery on these claims. The examiner held that the Bureau mineral examiners had failed to sample places on these claims where a witness for Mr. Webb testified he found

valuable deposits of gold and silver. No appeal was taken from that decision. Thereafter, Mr. Webb filed applications for mineral patents Arizona 032789 and 034090 for the claims now in issue. The Bureau then intitiated the present contests against the claims and mineral patent applications, charging that valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining law. Answers to both contest complaints were filed by Mr. Webb's attorney. A hearing was held before the Hearing Examiner on November 8 and 9, 1966. The transcript and exhibits of the earlier hearing were offered and received as evidence in the present proceedings, together with an additional showing offered by both parties.

At the hearing it was established that a mine had operated on the Leo Nos. 3 and 4 claims during the eighties (Tr.

152), and in 1928 it was reactivated and several thousand dollars worth of bullion was produced from ore containing from $12 to $16 worth of gold per ton. The mine was abandoned until 1934, when it was worked on a small scale with unknown results.

A Bureau mineral examiner, after qualifying as a trained mining engineer, established that Mr. Webb sent his son on each of the contested claims with the examiner to point out for verification each place deemed a discovery point (Tr. 316-317). The mineral examiner testified as to the manner in which he sampled each of these places that was available for examination together with other places on the claims he considered worthy of sampling. A consulting mining engineer employed by Mr. Webb testified that material had washed down and covered some places on the claims (Tr. 208). There are also shafts on the property that are

too dangerous to enter (Tr. 188, 246)-in fact the Bureau examiner sampled in one shaft that the consulting mining engineer would not enter (Tr. 217).

On the Alta Vista No. 1 claim, the Bureau mining engineer took four samples from an exposure identified by Mr. Webb's son as the discovery point, and he obtained representative assay values of $8.40, $6.30, $4.90 and $1.40 per ton for gold; the highest value for silver was 77 per ton(TR. 51-55; Exhs. 23, 24). Instead of sampling the designated discovery point, the contestee's consulting mining engineer cut one sample from an area of tiny quartz stringers across an aggregate of 14 inches (Tr. 216). The witness sampled by throwing away rock wall and selecting just vein material for his composite sample (Tr. 216). The sample when assayed showed representative values per ton of $35 for gold and $1 for silver (Exh. E)..

On the Alta Vista No. 2 claim, the Bureau mineral examiner sampled a pit indicated by the son as a discovery point, and the sample showed representative values of $1.05 per ton in gold and 50 per ton in silver (Tr. 67-68; Exh. 24). A chip sample near the southwest corner of the claim assayed representative values of $.20 per ton in gold and 62 per ton in silver (Tr. 69-70; Exh. 25). Three samples from a four foot pit near the boundary of the claim with the Leo No. 2 claim reflect the spotty mineralization of the area, since the samples assayed representative values of $8.75, 35 and 35 per ton in gold, with a high value for silver of only 62 per ton (Tr. 71-73; Exhs. 26, 27). A sample of the material which assayed less than a dollar increased to representative values of $3.50 per ton in gold and 37 per ton in silver when only vein material was sampled (Tr. 73; Exh.27)-which

demonstrates that the manner in which an area is sampled is reflected in the assay values revealed. Again, the contestee's consulting mining engineer did not sample the indicated discovery point, but collected material with a pick from quartz stringers exposed on the claim, which assayed representative values of $36.05 per ton in gold and 75 per ton for silver (Tr. 215; Exh. E). The consulting mining engineer conceded that he avoided taking rock wall with his sample (Tr. 215), so the selective sample would reflect lesser values if cut by practical mining procedures when expanded to a three foot minable width (Tr. 339, 345).

The Bureau mineral examiner took two chip samples from a 15 foot long inclined shaft on the Leo No. 1 claim which had been shown to him by Mr. Webb's son as the discovery point. The samples both assayed representative values of 35 per

ton for gold--they assayed $5.37 and $3.12. per ton for silver (Tr.85-86; Exh. 28). The contestee's consulting mining engineer again did not testify concerning the discovery point, but showed that he sampled some quartz outcroppings on this claim which assayed represented values of $28.35 per ton for gold and 50 per ton for silver (Tr. 216; Exh. E). Again the witness selected only vein material (Tr. 216).

On the Leo No. 2 claim the Bureau mineral examiner took three samples, including sampling of the designated discovery point, and these samples showed representative values of $4.20, $4.20 and 17 per ton for gold and all samples assayed 37 per ton for silver. The consulting mining engineer again chose a different place on this claim, a quartz vein, and obtained a sample that assayed representative values of $28.35 per ton for gold and 50 per ton for silver (Tr.

216-217; Exh. E).

Mr. Webb has his residence on the Leo No. 3 claim. This claim is the most interesting of the contested claims. It is the claim upon which most of the old mine workings are found. Mr. Webb testified at both hearings that this is the claim which he plans to commence to mine (Tr. 324). This is the only claim on which the contestee's consulting mining engineer obtained a sample which consisted of material from one vein and is not merely a composite of material selected from several tiny veinlets or stringers (Tr. 228). Mr. Webb's son showed the Bureau mineral examiner a remaining pillar in an old stope as the discovery point, but Mr. Webb agrees that the pillar cannot be mined without the stope caving in. Nevertheless, the Bureau mining engineer sampled the pillar and obtained assayed representative values of $11.80 and $9.10 per ton for

gold and 52 and 50 per ton for silver (tr. 87-88; Exhs. 23, 28). The consulting mining engineer chose a different place on the claim, a bulldozed area near the old mine on which he exposed an 18 inch wide vein the Saturday before the hearing (Tr. 212, 222-223). The witness had the vein drilled into for a depth of six feet with a drill approximately 2 inches wide (Tr.218-219). From the dust blown from this small drill hole he composed a sample which assayed representative values of $42.70 per ton for gold and 75 per ton for silver (Exh. E). Mr. Webb also sampled a vein on this claim, it is not certain whether it was the same vein examined by his expert witness, and the claimant testified that from a drill hole and a shaft he obtained samples with assayed representative values of $87.50 and $45.50 per ton for gold (Tr. 295-297). Since the contestee testified that

it would be too dangerous to mine the shaft, that sample is not significant (Tr. 297). Because the contestee appears to stress the significance of the vein on this claim, we, by way of example, have computed the value of the $42.70 sample taken with a 2 inch drill by diluting the sample to a 36 inch minable width, and such sample would then merely represent values for gold of $2.26 per ton.

The Bureau mineral examiner took a sample from the place shown to him by the son as the discovery cut on the Leo No. 4 claim, but it only assayed representative values of 17 per ton for gold and 25 per ton for silver (Exh. 28). Mr. Webb testified that his son cut a sample from this claim that assayed representative values of $11.20 per ton for gold (Exh. D), but, since the witness is uncertain as to where the sample was cut, such testimony can be given little weight (Tr. 298).

In a place designated by Mr. Webb's son as a discovery point on the Turkey Track No. 3 claim, the Bureau mineral examiner took four channel samples and obtained no assay values representing higher than 17 per ton for gold and 87 per ton for silver (Tr. 24-36, 40-48; Exhs. 19, 20, 21). The mining claimant's expert witness again did not testify concerning this place, but chose a vein 18 inches wide. He cut a sample from this vein that assayed representative values of $18.90 per ton for gold and 37 per ton for silver. Illustrative that such narrow veins would diminish considerably in values when expanded to a three foot minable width, the witness then cut two samples from the walls of this vein and obtained representative assay values of only $3.50 and $1.40 per ton for gold and 25 and 50 per ton for silver (Exh. F). The consulting engineer agreed he had not found a discovery on

this claim. (Tr. 256).

The veins described on the claims are small or their size has not been determined. The mineralization is spotty on every claim. The terrain is generally rough (Tr. 11) and some of the purported discovery sites can only be reached on foot (Tr. 13, 15). The places mined previously with possible success are no longer accessible. Mr. Webb purchased the claims in February 1956 (1957 Hr. Tr. 215), but he has never mined or sold any material from any of the claims (Tr. 318).

The evidence of sampling done at the earlier hearing is similar to that discussed above-the samples offered in evidence by the contestee showing higher representative assay values than those shown from samples cut by Bureau mineral examiners. At both hearings the testimony showed that the parties did not sample the same places and there was no

joint sampling. The significant difference in the evidence adduced at the present hearing is that this time the Bureau mineral examiner provided the mining claimant with an opportunity to show the former the deposits on which he asserted a discovery and the Bureau mining engineer examined each such place and was not able to verify that sufficient quality and quantity of values were present to be economic to mine.

Factors relevant to a determination as to whether a valid discovery has been made include the cost of mining or extraction, transportation and processing. United States v. R. W. Wingfield, A-30642 (February 17, 1967). The Bureau mining engineer estimated that it would cost $21.41 per ton direct costs to operate on the claims with a two man crew moving six tons of material a shift (Exh. 31), and the claims are not at present in a condition for such an

operation. The equipment on the claims is not adequate for mining operations (Tr. 196, 198).

At the contest hearing held in 1957, Mr. Webb testified that he planned to work the old mine on the Leo No. 3 claim, and work the other claims in connection with this operation (1957 Hr. Tr. 219, 220). At the hearing held in 1966, Mr. Webb testified that he never embarked upon the drilling program he had described at the earlier hearing because he later found it would be too expensive to make the old mine safe to enter (tr. 331). Instead, Mr. Webb testified that in approximately 1961 he found an 18 inch vein on the Leo No. 3 claim which he plans on mining for a year or more before entering the old mine (Tr. 324, 332). Mr. Webb's son had not told the Bureau mineral examiner about this vein.

The appellant asserts that the issues posed by the present contest

proceeding are res judicata in view of the dismissal of the earlier contest proceeding against some of the mining claims. The principle of res judicata (or its administrative law counterpart- the doctrine of finality of administrative action) has no application to the Department relating to disposition of the public domain until legal title passes. United States v. United States Borax Company, 58 I.D. 426 (1943). The important aspects of the Secretary's powers as guardian of the public lands are that it is primarily a power over lands and that all proceedings with relation to any particular public land are merely steps in a continuous proceeding in rem, never financially terminated until legal title passes. The Secretary must be especially astute to ascertain the facts in a case of this kind by guarding against any substantial error before authorizing the issuance of

patents, for the ultimate issue now is whether it is proper for the Secretary to convey title to the land under the general mining laws. Thus, the Department held in United States v. LaFortuna Uranium Mines, Inc., A-29852 (May 4, 1964), that the fact that a mining claim may at one time have been found to be a valid claim does not estop the Department, under the principle of res judicata, from bringing an adverse proceeding against the claim to determine whether there is a present valid discovery on the claim when an application for patent to the claim is subsequently filed. Moreover, the Hearing Examiner's decision in Arizona Contest No. 10013, supra, did not determine that a valid discovery had been shown on any of the claims, 1/ but merely

1/ In that decision we note that the Hearing Examiner concluded "* * * that the contestant has failed to establish, by a preponderance of the evidence, the truth of the charges filed against those claims* * *." The Courts and the Department have consistently held that

held that the contestant had failed to establish that no discovery had been made. The doctrine of finality of administrative action is not applicable to the contest proceedings now under consideration by reason of the decision in the earlier proceeding relating some of the same mining claims.

The appellant questions the accuracy of the sampling methods of the Government mineral examiners, basing his objection upon the low assay values obtained by these examiners when compared with those samples cut by himself and his consulting mining engineer which were assayed and offered in evidence. As stated, the samples taken by each of the parties are

when the Government establishes a prima facie case, the contestee has the burden of proving the issue of discovery by a preponderance of the evidence, not merely evidence of equal weight. Converse v. Udall 262 F. Supp. 583, 596 (D. Ore. 1967), aff'd 399 F. 2d 616 (9th Cir. 1968). Although the conclusion placed an improper burden of proof upon the contestant, it is clear from a reading of the entire decision that the Hearing Examiner held that the contestant had failed to rebut the contestee's allegation of discoveries by not examining the places asserted as the discovery points.

not from the same places. The Bureau mineral examiner in the present proceeding examined and sampled every place designated as a discovery point. It is the duty of a mining claimant whose claims are being contested or who seeks mineral patent to keep discovery points available for inspection by Government mineral examiners, and an examiner has no duty either to rehabilitate the discovery points or to explore beyond the current workings of the mining claimant in an effort to verify a purported discovery. The Government need not make the exhaustive examination that a claimant would do in prospecting. See United States v. Thomas C. Wells, A-30805 (January 8, 1968). The function of the Government is one of investigating for the purpose of verifying, if possible, the claimed discovery. Then the mining claimant has the burden of showing what the Government mineral examiners

missed. United States v. Frank Coston, A-30835 (February 23, 1968). The Bureau mining engineer examined all places shown to him, he also examined other places that he deemed likely to be significant. We note that some of the claims have little in the way of workings upon them, and some of the workings have been allowed to be covered or otherwise become inaccessible. The Bureau mineral examiner established a prima facie case of no discovery by his testimony that he had examined the exposed workings on each claim, that he had taken mineral samples from every point suggested by the representative of the mining claimant as demonstrating the best values found on the claims, and that he had found no deposit of sufficient quality and quantity to make a profitable operation reasonably possible. United States v. Mrs. Frances Swain, A-30926 (December 30, 1968). From the record, it appears

that the Government mineral examiner used approved methods in examining the claims, and the appellant's showing that he and his witness obtained greater values in other places does not impeach the contestant's sampling procedures.

Concerning the evidence of samples cut by the mining cliamant and his consulting mining engineer, several of the samples from drill holes and other samples are merely selective samplings and do not accurately represent the area sampled. Furthermore, an assay value not related to a minable width is meaningless in itself. United States v. Jesse W. Crawford, A-30820 (January 29, 1968), footnote four. A vein of less than minable width will bring down the assayed value of a mineral deposit in combination of ways-by diluting the ore with barren country rock, and by increasing mining costs through additional handling of barren rock (both in sorting the barren

rock from the ore and in removing the barren rock to get to the vein). United States v. R. W. Wingfield, supra. The strongest vein the appellant has referred to is the 18 inches wide vein on the Leo No. 3 claim, which is only half of a miniable width. Although the appellant has found ore samples with indicated values, before dilution to a minable width, as high as $87.50 per ton, the record based upon a few isolated high value samples does not support a finding that he has found a deposit yielding ore in excess of the cost of mining it. Isolated values occurring in a vein which only suggest the possible existence of a valuable minerals deposit in the course of the vein merely call for further exploration to find the deposit supposed to exist. United States v. Kenneth O. Watkins et al., A-30659 (October 19, 1967). The basic problem here lies in the failure of the patent applicant to

establish the quality of any ore the quantity of which can be estimated.

The Secretary of the Interior is not authorized to issue a patent to mining claims until he is satisfied that the requirements of discovery have been shown. United States v. New Jersey Zinc Company, 74 I.D 191, 205 (1967). Before mineral patents can be issued it must be shown as a present fact that the mining claim is valuable now for minerals. Little weight can be given to the testimony relating to the nature of past workings which are now not accessible. United States v. R. W. Wingfield, supra. The examination by the Bureau mineral examiner of each porported discovery point suggested by the patent applicant's representative failed to verify a deposit of sufficient quality and quantity to be mined with a reasonable expectation of making a profit. The few isolated samples offered

in evidence by the patent applicant from an area of higher mineral concentration are not representative of the claim from which each was cut, and, consequently, must properly be denied substatial wight. United States v. August Herman, 72 U,D, 307, 312 (1965). The mineral patent applicant has not shown that there is now a mineral deposit on any of the claims that has economic significance and would be worth developing, but he may be warranted in exploring further. The appellant asserts that prospecting by a small operator is not distinguishable from development activities. However, the Department has consistently held that evidence that might encourage further prospecting or exploration is not a discovery within the mining laws. See United States v. C. B. Myers et al., 74 I.D. 388 (1967).

For the reasons stated, the Hearing Examiner's decision holding that the

mining claims are null and void and rejecting the appellant's mineral patent applications for these claims is affirmed.

* * * (Paragraph providing for appeal deleted) * * *

/s/ Frances A. Patton
Chief, Branch of
Mineral Appeals
Office of Appeals and
Hearings

UNITED STATES

v.

H. B. WEBB

1BLA 70-33 Decided October 15, 1970

Mining Claims: Discovery: Generally

To constitute a valid discovery upon a lode mining claim there must be a discovery on the claim of a lode or vein bearing mineral which would warrant a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine; it is not sufficient that there is only a showing which would warrant further exploration in the hope of finding a valuable deposit.

Administrative Practice --Rules of Practice: Generally--Mining Claims: Contests--Res Adjudicata

The fact that a mining claim may at one time have been found to be a valid claim does not estop the Department, under the principle of

res judicata, from bringing adverse proceedings against the claim when an application for patent to the claim is filed.

Mining Claims: Patent--Mining Claims: Discovery

An application for a mineral patent will be rejected and the mining claim declared null and void where, although the claim may formerly have been valuable for minerals, it is not shown as a present fact that the land is mineral in character and is valuable for its mineral content.

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C. 20240
Board of Land Appeals

IBLA 70-33	:	Arizona Contest No.s 032789 and 034090 Lode mining claims declared null and void and patent applications rejected.
UNITED STATES	:	
v.	:	
H. B. WEBB	:	Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGMENT

H. B. Webb has appealed from a decision dated January 31, 1969, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed the decision of a hearing examiner dated March 29, 1967, declaring certain designated mining claims situated in secs. 21 and 22, T. 4N., R. 3 E., G. & S. R. M., Maricopa County, Arizona, to be null and void for want of a discovery of a valuable mineral deposit within the limits of each claim and rejecting the patent applications for the claims.

The contested mining claims are approximately eighteen miles north of Phoenix, Arizona, west of Cave Creek Road in the southern Union Hills. Contest proceedings were initiated by the Bureau of Land Management by complaints dated May 17, 1965, charging that valuable minerals have not been found within the limits of the Leo Nos. 1, 2, 3 and 4, Alta Vista Nos. 1 and 2 and Turkey Track No. 3 so as to constitute a valid discovery within the meaning of the mining laws. The contestee filed an answer denying the charges generally. At the hearing it was disclosed that in a previous contest, Arizona Contest No. 10013, the complaint against the Leo Nos. 2 and 4, Alta Vista Nos. 1 and 2, and Turkey Track No. 3 lode mining claims was dismissed by a hearing examiner on December 23, 1957, for the reason that the contestant failed to show by a preponderance of the evidence that there

was not a discovery on those claims. That decision did not declare the claims valid. The transcript, exhibits, decision and findings of fact and conclusion of law in the earlier proceedings were received as evidence in the present proceedings by stipulation of the parties.

The hearing examiner in the instant case, after summarizing the evidence adduced at the hearing, pointed out that the requirements for a discovery are set forth in the prudent man test laid down by the Department in Castle v. Womble, 19 L.D. 455 (1894), judicially approved in Chrisman v. Miller, 197 U.S. 313 (1905), and more recently reaffirmed in Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963)1/ and that a valid discovery

1/ "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

requires more than a finding of mineral indications that would warrant only further exploratory work to determine whether a valuable mineral deposit exists within the limits of the claim, citing United States v. Henault Mining Co., 73 I.D. 184 (1966), affirmed Henault Mining Co. v. Tysk, 419 F. 2d 766 (9th Circ. 1969), cert. denied, Henault Mining Co. v. Zaidlicz, Sup Ct. No. 1460 (June 8, 1970). This principle was sustained in Converse v. Udall, 339 F. 2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969), decided after the hearing examiner's decision in the present contest.

The hearing examiner found, after considering the evidence presented at both hearings, that the nature of the mineralization, its quality and quantity and the estimates of mining costs did not show by a preponderance of evidence that a prudent man would be justified in the

further expenditure of his labor and means with a reasonable propect of success in developing a valuable mine on these claims. He noted that the contestee did not claim to have found a deposit which in itself has value for mining purposes, but only that the findings of some mineral valule justifies further expenditure in time and money in exploring for deposits which may reasonably be expected to be found. The examiner concluded that the contestee did not show that he had made a discovery of a valuable mineral deposit within the limits of any of the contested claims. He declared the claims invalid and rejected the patent applications.

The appellant's stated reasons for appeal to the Secretary are that he adopts by reference the statement of reasons for his appeal to the Director, Bureau of Land Management, and incorporates by reference the hearing

examiner's decision and findings of fact and conclusions of law in Arizona Contest No. 10013, together with all the testimony, pleadings and exhibits filed in that case, as they relate to mining claims involved in this contest.

In appealing to the Director, Bureau of Land Management, appellant challenges the hearing examiner's decision as being contrary to the evidence questions the Government mineral examiner's sampling of the claims, adverts to the higher values shown in samples of the appellant, contends that the 1957 hearing examiner's decision dismissing the complaint against the Leo Nos. 2 and 4, Alta Vista Nos. 1 and 2, and Turkey Track No.3 lode claims is res adjudicata as to them, and asserts that prospecting by a small operator is not distinguishable from development activities.

The entire record, which includes the 1957 proceeding, has been reviewed.

We have carefully considered the decision of the Office of Appeals and Hearings, Bureau of Land Managment, acting for the Director, which summarizes the evidence and discusses the points raised by the appellant, and find that the discussion and findings are correct. In view of the fact that appellant has not presented any new issues on appeal to the Secretary, there is no need to repeat the discussion and finding. It is sufficient to state that we adopt the Bureau's decision2/, which affirms, for the reasons stated therein, the hearing examiner's decision holding the contested mining claims invalid and rejecting the mineral patent applications for them.

Therefore, pursuant to the authority delegated to the Office of Hearings and Appeals, Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed

2/ Bureau decision appended hereto.

from is affirmed.

Frances Mayhue,
Member

I concur:

Martin Ritvo, Member

I concur:

Edward W. Stuebing,
Member

UNITED STATES V. WEBB
Plaintiff-Appellee,
v.
Hiram WEBB, Defendant-Appellant.
No. 79-3484.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 11, 1981.

Decided Sept. 8, 1981.

The United States brought action for ejectment. The United States District Court for the District of Arizona, C. A. Muecke, Chief Judge, rendered summary judgment for the Government, and defendant appealed. The Court of Appeals, Norris, Circuit judge, held that although 12 months after Government moved for summary judgment defendant sought leave to amend his pleadings to allege valid placer claims, as contrasted with lode mining claims, and to request judicial review of nine-year-old administrative decision that his lode claims were null and void, in absence of some statement of reasons or findings of

fact showing bad faith or prejudice, reviewing court could not determine whether it was abuse of discretion to deny motion for leave to amend.

Vacated and remanded.

1. **Ejectment - 39**

There is no statute of limitations for judicial review of an administrative decision by the Department of Interior's Board of Land Appeals in a federal mining laws proceeding; thus, a BLA decision is ordinarily reviewable in a subsequent action for ejectment regardless of how much time has elapsed subject to rules of pleading which the Federal Rules of Civil Procedure impose and to general principles of estoppel.

2. **Federal Civil Procedure - 828**

In exercising its descretion on motion to amend the pleadings, a court must be guided by the underlying purpose of the amendment rule, i. e., to

facilitate decision on the merits rather than on the pleadings or technicalities. Fe. Rules Civ. Proc. Rule 15, 28 U.S.C.A.

3. **Federal Civil Procedure - 833**

Federal rule's policy of favoring amendments to pleadings should be applied with extreme liberality. Fed. Rules Civ. Proc. Rule 15, 28 U.S.C.A.

4. **Federal Civil Procedure - 834**

Factors relevant to whether a motion for leave to amend pleadings should be denied are: undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party, although such factors are not of equal weight. Fed. Rules Civ. Proc. Rule 15, 28 U.S.C.A.

5. **Federal Courts - 942**

Although 12 months after Government moved for summary judgment in ejectment action defendant sought leave to amend his pleadings to allege valid placer

claims, as contrasted with lode mining claims, and to request judicial review of nine-year-old administrative decision that his lode claims were null and void, in absence of some statement of reasons or findings of fact showing bad faith or prejudice, reviewing court could not determine whether it was abuse of discretion to deny motion for leave to amend and vacated summary judgment for the Government and remanded for further proceedings. Fed. Rules Civ. Proc. Rule 15, 28 U.S.C.A.

Appeal from the United States District Court for the District of Arizona.

Before ANDERSON and NORRIS, Circuit Judges, and TAKASUGI, District Judge.*

*The Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

NORRIS, Circuit Judge:

This appeal involves a dispute over appellant Webb's right to occupy certain federal lands within the city limits of Phoenix, Arizona. Webb's claim for occupancy arises under federal mining laws. He appeals the district court's denial of leave to amend his pleadings, and its grant of summary judgment for the Government in its action for ejectment.

I.

In 1956, Webb received quitclaim deeds to a series of lode claims on federal public lands open to prospecting and mineral development. Seven of those claims comprise the 140 acres here in dispute.

Shortly after Webb obtained the quitclaim deeds, the United States Bureau of Land Management (BLM) reclassified the federal land encompassing Webb's claims as suitable for lease and sale for residential purposes. Existing valid

mining claims were excepted from the reclassification. After Webb submitted a verified statement of his claims, as required by the reclassification order, the BLM initiated contest proceedings against the claims. In 1957, the BLM complaint against the seven lode claims which encompass the land here in issue was dismissed by the BLM Hearing Examiner. No judgment of validity or invalidity was rendered as to those seven claims.

In 1963, Webb filed applications for mineral patents for the seven lode claims. The BLM contested the patent applications, and again challenged the validity of the claims, charging that Webb had failed to find valuable materials sufficient to constitute "discovery" under federal mining laws. In 1967, a BLM Hearing Examiner rejected Webb's patent applications and, in addition, declared his lode claims null

and void. Webb appealed this decision to the BLM's Branch of Mineral Appeals and then to the Department of Interior's Board of Land Appeals (BLA). Each body affirmed the Hearing Examiner's decision against Webb's claims. Webb did not seek judicial review of the administrative decision when it became final in 1970. In 1973, following a proposal by the City of Phoenix to purchase, for use as park land, certain federal land encompassing the land in issue, the BLM closed the area to further mineral entry, again subject to existing valid claims. The land was then reclassified as available for disposal under the Recreation and Public Purposes Act, 43 U.S.C. ss. 869. The Government brought this action in ejectment, seeking recovery of possession of the land, and a judicial declaration that Webb is without right, title or interest in the property.

In 1979, after the Government filed

a motion for summary judgment twelve months after the original pleadings, Webb sought leave to amend his pleadings to allege valid placer claims (as contrasted with lode claims) and to request judicial review of the 1970 administrative decision that his lode claims were null and void. The district court denied Webb's motion for leave to amend his pleadings and granted full summary judgment for the Government.

II.

[1] There is no statute of limitations for judicial review of an administrative decision by the BLA. Thus, a BLA decision is ordinarily reviewable in a subsequent action for ejectment regardless of how much time has elapsed. See Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), rev'd on other grounds, 390 U.S. 599, 88 S. Ct. 1327, 20 . Ed. 2d 170 (1968). The broad rule that judicial review of BLA

decisions is available without regard to passage of time is subject, however, to the rules of pleading which the Federal Rules of Civil Procedure impose upon all parties, and to the general principles of estoppel.

[2,3]Fed. R. Civ. P. 15 places leave to amend, after a brief period in which a party may amend as of right, within the sound discretion of the trial court. Se PSG Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 417 F.2d 659, 664 (9th Cir. 1969), cert. denied, 397 U.S.918, 90 S. Ct. 924, 25 L.Ed.2d 99 (1970). In exercising this discretion, a court must be guided by the underlying purpose of Rule 15--to facilitate decision on the merits, rather than on the pleadings or technicalities. See Conley v. Gibson, 355 U.S 41, 47-48, 78 S.Ct. 99, 102-103, 2 L.Ed.2d 80 (1957). Accordingly, Rule 15's policy of favoring amendments to pleadings should be applied

this opinion. We express no opinion as to whether the record, now or as it may be developed, would support findings that Webb acted in bad faith or that prejudice would result from either of his desired amendments, should such findings be made by the district court.

Furthermore, by remanding, we express no opinion whatsoever with respect to the merits of either of Webb's desired amendments should leave to amend be granted by the district court.

VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff/Counter-defendant, vs. HIRAM B. WEBB, Defendant/Counter-claimant.	)	No. CIV 77-246 PHX CAM O R D E R

Having received and considered Plaintiff's Motion for Summary Judgment, filed May 14, 1982; Plaintiff's Statement of Facts, filed May 14, 1982; Plaintiff's Memorandum of Points and Authorities, filed May 14, 1982; Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, Statement of Facts, and Memorandum of Points and Authorities, filed June 18, 1982; Defendant's Supplement to

Defendant/Counterclaimant's Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment, filed June 22, 1982; Plaintiff's Reply to Defendant's Response and Cross-Motion for Summary Judgment, filed August 4,1982; and Defendant's Response to Reply to Defendant's Response and Cross-Motion for Summary Judgment, filed September 7, 1982; and having heard oral argument thereon at 10:00 a.m. on Monday, October 4, 1982, this Court finds:

(1) That Plaintiff, the United States, seeks summary judgment on the issue of whether the United States Department of the Interior's administrative decision that declared defendant Hiram B. Webb's seven lode claims null and void should be upheld.

(2) That there are no genuine issues of material fact. Rule 56, Federal Rules of Civil Procedure.

(3) That the Defendant's alleged

placer claims have never been considered by the appropriate administrative agency, and as the parties both agreed during oral argument, are thus not now properly before this Court.

(4) That Defendant Webb filed applications for mineral patents for seven lode claims in 1963.

(5) That the Bureau of Land Managment (B.L.M.) of the United States Department of the Interior contested the patent applications and challenged the validity of the lode claims, charging that Defendant had failed to find valuable materials sufficient to constitute "discovery" under federal mining laws.

(6) That on March 29, 1967, a B.L.M. Hearing Examiner rejected Defendant's patent applications and, in addition, declared his lode claims null and void.

(7) That Defendant appealed this decision, and on January 31, 1969, it was

affirmed by the B.L.M.'s Branch of Mineral Appeals, Office of Appeals and Hearings.

(8) That Defendant appealed that decision and on October 15, 1970, it was affirmed by the Department of the Interior's Board of Land Appeals (I.B.L.A.).

(9) That on June 18, 1982, Defendant filed an Amended Answer and Counterclaim, which included a request for judicial review of the above-mentioned administrative proceedings, pursuant to 5 U.S.C. § 701 et seq., the Administrative Procedure Act.

(10) That the standard of review under the Administrative Procedure Act is whether the administrative agency's actions were arbitrary, capricious, an abuses of discretion, or otherwise not in accordance with law, or unsupported by substantial evidence.' Coleman v. United States, 363 F.2d190 (9th Cir. 1966),

with "extreme liberality." See Rosenbert Brothers & Co. v. Arnold, 283 F.2d 406 (9th Cir. 1960) (per curiam).

[4] In Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed2d 222 (1962), the Supreme Court identified four factors relevant to whether a motion for leave to amend pleadings should be denied: undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party. In Howey v. United States, 481 F.2d 1187 (9th Cir. 1973), this Court analyzed these factors, and concluded that they are not of equal weight. Specifically, we noted that delay alone - no matter how lengthy - is an insufficient ground for denial of leave to amend. "Only where prejudice is shown or the movant acts in bad faith are courts protecting the judicial system or other litigants when they deny leave to amend a pleading." Id. at 1191. See also Hanson v. Hunt Oil

Co., 398 F.2d 578, 581-82 (8th Cir. 1968); Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380, 384 (2d Cir. 1968). "The mere fact that an amendment is offered late in the case is . . . not enough to bar it." 3 Moore's Federal Practice ss.15.08[4] at 15-102. Thus in Howey, the court held that the district court had abused its discretion in denying leave to amend even five years after the original pleadings, where neither bad faith nor prejudice was apparent. 481 F.2d at 1190-92.

[5] In the absence of some statement of reasons or findings of fact showing bad faith or prejudice, we cannot determine whether it was an abuse of discretion to deny Webb's motion for leave to amend his pleadings. Accordingly, we vacate the summary judgment for the government and remand the case to the district court for further proceedings not inconsistent with

rev'd on other grounds, 390 U.S. 599, 88 S.Ct. 1327, 20 L.Ed2d 170 (1968).

(11) That Defendant's basic argument is that the administrative decision was not supported by "substantial evidence," which has been judicially defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S.Ct. 1018 (1966).

(12) That under the Mining Act of May 10, 1982, 30 U.S.C. § 22 et seq., the claimant has the burden of establishing that he has discovered a valuable mineral deposit within the limits of each claim. Cole v. Ralph, 252 U.S. 286,295, 40 S.Ct. 321 (1920); United States v. Springer, 491 F.2d 293,242 (9th Cir. 1974).

(13) That the test fashioned by the Department of the Interior and the Courts to ascertain whether a valuable mineral

has been discovered is the "prudent man test." Under that test, in order to qualify as a 'valuable mineral deposit,' the discovered deposit must be of such a character that 'a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.' Castle v. Womble, 19 L.D. 455, 457 (1894); Chrisman v. Miller, 197 U.S. 313, 25 S.Ct. 468 (190; Best v. Humboldt Mining Co.,371 U.S. 334, 335-336, 83 S.Ct. 379 (1962).

(14) That the "prudent man test" has been augmented by the "marketability test." The prudent man test and the marketability test are not distinct standards, but are complimentary in that the latter is a refinement of the former. Unted States v. Coleman, supra. The combined test requires evidence of a mineral deposit of such

character that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that minerals from the claims could be extracted and marketed at a profit. United States v. Barrows, 447 F.2d 80, 82 (9th Cir. 1971). However, actual successful exploitation of a mining claim is not required to satisfy the prudent man test. United States v. Barrows, supra.

(15) That, however, evidence showing a "possiblity" that the land contained minerals sufficient to make it "cheifly valuable therefor" is not enough. Chrisman v. Miller, 197 U.S. 313, 25 S.Ct. 468 (1905).

(16) That a valid discovery would warrant development work, not just further exploratory work to determine if valuable mineral deposits exist. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974).

(17) That the B.L.M. Hearing Examiner's decision, dated March 29, 1967, applied the above-stated authority and was supported by the following evidence and conclusions:

(a) "In the ten years that have elapsed since the 1957 hearing (an earlier proceeding in which the B.L.M. complaint against the seven lode claims was dismissed, without a judgment of either validity or invalidity), it appears from the testimony that no effort has been made to connect any veins, nor has any development work been done." (March 29, 1967 Decision, at 35).

(b) The testimony on the costs of mining by Charles K. Miller, mining engineer for the B.L.M., which was corroborated by the testimony of two other mining engineers, Luther S. Clemmer and Robert T. Mitcham.

(c) A pamphlet called "Exploration and Development of Small

Mines" by Harry E. Krumlauf of the Arizona Bureau of Mines.

(d) "(A)t one time, prior to 1928, the Jack White Claim (now Leo Nos. 3 and 4 claims) may have been a valuable mine, since $10,000 worth of gold was extracted therefrom prior to 1928. However, no mining has been done on any of these claims by Mr. Webb who has owned them since 1956. He has realized no money from any of these claims since he has owned them and there still appears to be more prospecting work needee." (March 29, 1967 Decision, at 35).

(e) "Labor costs must be considered in determining whether a mining operation has a reasonable prospect of success. The contestant presented considerable evidence as to the cost of mining which would leave very little room for profit, if any." (March 29, 1967 Decision, at 35).

(f) "However, Mr. Webb had

indicated that by placing a mill on the Leo No. 3 cliam, he will mill his own ore and conduct the operation by himself and one other person. There is no reason to treat the value of the labor of a mining claimant any differently from that of one he might hire; either one must be taken into consideration in determining the likelihood of a profitable venture being established. United States v. Vernon O. and Ina C. White, A-30460 (December 3, 1965)." (March 29, 1967 Decision, at 36)

(g) The information upon which the claimant based his belief that ore was remaining in the Leo Nos. 3 and 4 claims was "not conclusive." (March 29, 1967 Decision, at 36).

(h) The testimony at the previous hearing, in 1957.

(i) The nature of the mineral deposit, and its quality and quantity, as stated by the various persons who testified.

(J) The contestee did not show by a preponderance of the evidence that a prudent man would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine on these claims. (March 29, 19677 Decision, at 36).

(18) That the January 31, 1969 Decison by the B.L.M.'s Branch of Mineral Appeals, Office of Appeals and Hearings, also pointed out that:

(a) "The veins described on the claims are small or their size has not been determined. The mineralization is spotty on every claim. The terrain is generally rough (Tr. 11) and some of the purported discovery sites can only be reached on foot (Tr. 13, 15). The places mined previously with possible success are no longer accessible. Mr. Webb purchased the claims in February 1956 (1957 Hr. Tr. 215), but he has never

mined or sold any material from any of the claims (Tr. 318)." (January 31, 1969 Decision, at 74).

(b) The Bureau mineral examiner had provided the mining claimant with an opportunity to show the former the deposits on which he asserted a discovery and the Bureau mining engineer examined each such place and was not able to verify that sufficient quality and quantity of values were present to be economic to mine. (January 31, 1969 Decision, at 75).

(c) "The Bureau mineral examiner established a prima facie case of no discovery by his testimony that he had examined the exposed workings on each claim, that he had taken mineral samples from every point suggested by the representative of the mining claimant as demonstrating the best values found on the claims, and that he had found no deposit of sufficient quality and

quantity to make a profitable operation reasonably possible. United States v. Mrs. Frances Swain, A-30926 (December 30, 1968). From the record, it appears that the Government mineral examiner used approved methods in examining the claims, and the appellant's showing that he and his witness obtained greater values in other places does not impeach the contestant's sampling procedures." (January 31, 1969 Decision, lt 77).

(d) "Concerning the evidence of samples cut by the mining claimant and his consulting mining engineer, several of the samples from drill holes and other samples are merely selective samplings and do not accurately represent the area sampled. Furthermore, an assay value not related to a minable width is meaningless in itself. United states v. Jesse W. Crawford, A-30820 (January 29, 1968), footnot four. A vein of less than minable width will bring down the assayed

value of a mineral deposit in a combination of ways -- by diluting the ore with barren country rock, and by increasing mining costs through additional handling of barren rock (both in sorting the barren rock from the ore and in removing the barren rock to get to the vein). United States v. R. W. Wingfield, supra. The strongest vein the appellant has referred to is the 18 inches wide vein on the Leo No. 3 claim, which is only half of a minable width. Although the appellant has found ore samples with indicated values, before dilution to a minable width, as high as $87.50 per ton, the record based upon a few isolated high value samples does not support a finding that he has found a deposit yielding ore in excess of the cost of mining it. Isolated values occurring in a vein which only suggest the possible existence of a valuable mineral deposit in the course of the vein

merely call for further exploration to find the deposit supposed to exist. United States v. Kenneth O. Watkins, et al., A-30659 (October 19, 1967). The basic problem here lies in the failure of the patent applicant to establish the quality of any ore the quanitity of which can be estimated." (January 31, 1969 Decision, at 77-78).

(e) "Little weight can be given to the testimony relating to the nature of past workings which are now not accessible." (January 31, 1969 Decison, at 78).

(f) "The mineral patent applicant has not shown that there is now a mineral deposit on any of the claims that has economic significance and would be worth developing, but he may be warranted in exploring further. The appellant asserts that prospecting by a small operator is not distinguishable from development activities. However,

the department has consistently held that evidence that migght encourage further prospecting or exploration is not a discovery within the mining laws." (January 31, 1969 Decision, at 78).

(19) That the October 15, 1970 Decision of the I.B.L.A. stated that the record below had been carefully considered and that the discussion and findings were correct. (October 15, 1970 Decision, at 70).

Based upon the foregoing, and for all of the reasons stated by the Plaintiff, this Court concludes:

(1) That summary judgment is appropriate, in that there are no genuine issues of material fact. Rule 56, Federal Rules of Civil Procedure.

(2) That the administrative decision declaring Defendant Webb's seven lode claims null and void was supported by substantial evidence and should, therefore, be upheld.

(3) That Defendant Webb's alleged placer claims are not properly before this Court.

Therefore,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment, filed May 14, 1982, on the issue of whether the United States Department of the Interior's administrative decision that declared Defendant Webb's seven lode claims null and void be upheld, is granted.

IT IS FURTHER ORDERED that defendant's Cross-Motion for Summary Judgment, filed June 18, 1982, is denied.

Dated this 9th day of November, 1982.

C. A. Muecke, Chief Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Counter-defendant-Appellee,	)	No. 83-1595
V.	)	D.C. NO. CV 77- PHX-CAM PHX-CAM
HIRAM B. WEBB, Defendant-Counter-claimant-Appellant.	)	MEMORANDUM*

Appeal from the United States District Court for the district of Arizona
The Honorable C. A. Muecke, Presiding
Submitted October 17, 1983**

Before: HUG, PREGERSON, and REINHARDT, Circuit Judges.

The judgment of the district court is affirmed. The IBLA correctly stated and applied the test as to whether there

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 or the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

**The panel is unanimously of the opinion that oral argument is not required in this case. Fed. R. App. P. 34(a).

has been a valuable mineral deposit. United States v. Coleman, 390 U.S. 599, 602 (1968); Barton v. Morton, 498 F.2d 288, 289 (9th Cir.), cert. denied, 419 U.S. 1021 (1974). The record reflects substantial evidence supporting the decision of the IBLA.

No. 83-1405

In the Supreme Court of the United States

OCTOBER TERM, 1983

HIRAM B. WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Washington, D.C. 20530
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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1405

HIRAM B. WEBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Secretary of the Interior erred in determining that he had not discovered valuable minerals on public land — now located within the city of Phoenix, Arizona — which the City wants to purchase for use as a park, and thus was not entitled to a mining patent for the land.

1. On August 13, 1956, pursuant to the Small Tract Act of June 1, 1938, 43 U.S.C. 682a *et seq.*, the Department of the Interior issued Classification Order 52 classifying the land in question (except for valid mining claims) as suitable for lease and sale for residential purposes.[1] Petitioner responded by filing a verified statement of mining claims, as required by the 1956 reclassification. See generally 30

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[1]This classification order was later cancelled on June 14, 1965.

U.S.C. 22 *et seq.* Thereafter, a valuation engineer from the Bureau of Land Management ("BLM") examined petitioner's claims. As a result of the examination, on September 25, 1956, BLM filed a contest (Arizona 10013) against nine unpatented lode claims held by petitioner (Lora, Minnie, Victor, Leo No. 2 and No. 4, Turkey Track No. 1 and No. 3, Alta Vista No. 1 and No. 2). On December 23, 1957, a hearing examiner found that four of petitioner's lode claims (Lora, Minnie, Victor and Turkey Track No. 1) were null and void. The examiner dismissed the government's charges against petitioner's five other lode claims (Leo No. 2 and No. 4, Turkey Track No. 3, Alta Vista No. 1 and No. 2) as not supported by a preponderance of the evidence, but did not declare them valid. Pet. App. 1a-18a.

In 1963 and 1964, petitioner filed applications for mineral patents for the five lode claims against which charges were dismissed in 1957, as well as two others (Leo Nos. 1 and 3), asserting a discovery of gold and silver. Petitioner's patent applications excluded two conflicting lode claims (Golden Star lode in conflict with Leo No. 4 and South Extension in conflict with Turkey Track No. 3) and disclosed a conflict with petitioner's own lode claim to Turkey Track No. 4. Petitioner's patent application revealed no other conflicting placer or lode claims.

BLM challenged all seven of petitioner's lode claims. A hearing examiner issued a decision on March 29, 1967, rejecting all of petitioner's patent applications and declaring all seven lode claims null and void for lack of discovery (Pet. App. 19a-47a). After affirmance on an intermediate departmental appeal, the IBLA affirmed on October 15, 1970. 1 I.B.L.A. 67 (Pet. App. 72a-81a). Petitioner did not seek judicial review of IBLA's decision.

On April 26, 1973, BLM withdrew the lands in question from mineral entry and classified them for disposal under Section 1 of the Recreation and Public Purposes Act, 43

U.S.C. 869, and departmental regulations, 43 C.F.R. 2741.2(d). This withdrawal was made in response to a 1971 petition by the City of Phoenix to purchase this land for the proposed 800-acre Union Hills Park. Petitioner did not record any new mining claim locations between the 1970 IBLA decision and the withdrawal of these lands.

2. On August 24, 1976, BLM served petitioner with a Notice of Trespass and Notice to Remove Unauthorized Structures. When petitioner did not comply, the United States brought an action on March 29, 1977, to eject him from the seven unpatented lode claims that the IBLA had declared void. The United States also obtained an order allowing the Arizona Public Service Company to enter and construct a power line to provide electricity for a beacon light needed for safe operations at nearby Deer Valley Airport. Petitioner filed an answer and countercomplaint in which he asserted lawful possession of the seven tracts containing the lode mining claims that had been the subject of the 1963-1970 administrative proceedings. He still did not ask for judicial review of IBLA's final 1970 decision.

On January 23, 1978, the government filed a motion for summary judgment. In his response, petitioner, for the first time, alleged placer claims for granite. At one point petitioner referred to two placer claims "comprising a large portion of the West half of Section 22 * * *," and at another point he alleged the seven lode claim tracts as placer claims. Petitioner asked that the case be remanded to the Department of the Interior for a determination whether he had discovered valuable minerals on either his placer claims or lode claims. Then, on April 28, 1978, more than a year after the United States had filed its complaint, petitioner filed a motion under Rule 15(a) of the Federal Rules of Civil Procedure for leave to file an amended answer and countercomplaint "to clarify the issues before the Court."

In his proposed amended answer and countercomplaint, petitioner for the first time requested judicial review of the 1970 IBLA decision. Petitioner also sought to forestall ejectment by asserting that he had produced and sold granite from placer claims (but he did not specify the location, size or boundaries of these alleged placer claims). In addition, petitioner sought to raise several affirmative defenses that had first been presented in his response to the government's motion for summary judgment. The defenses asserted were: (1) the validity of the Turkey Track No. 3 lode claim by virtue of its location on other unpatented claims; (2) the existence of valid placer claims on the identical lands involved in this action, which petitioner asserted were properly located pursuant to 30 U.S.C. 38; and (3) that the government's ejectment action was barred by principles of estoppel, waiver, and administrative finality.

On September 18, 1978, after a hearing, the district court granted the government's motion for summary judgment and denied petitioner's motion to amend his pleadings. Judgment was entered on March 26, 1979, determining that petitioner had no rights or interest in the seven tracts on which he had asserted lode mining claims. The court did not rule on the alleged existence of placer mining claims. See Pet. App. 89a.

The court of appeals reversed and remanded. 655 F.2d 977 (1981) (Pet. App. 82a-90a, 91a). The court ruled that it could not determine on the existing record whether it was an abuse of discretion for the district court to deny petitioner's motion for leave to amend his plead ings. The court stated that it expressed "no opinion as to whether the record * * * would support findings that [petitioner] acted in bad faith or that prejudice would result from either of his desired amendments, should such findings be made by the district court" (*id.* at 91a). On remand, the district court

entered an order providing, among other things, that petitioner's motion to amend was granted insofar as it attempted to allege a defense of his lode claims comprised in IBLA's October 15, 1970, decision. The government then filed a renewed motion for summary judgment.

By order dated November 9, 1982, the district court granted the government's motion for summary judgment "on the issue of whether the United States Department of the Interior's administrative decision that declared [petitioner's] seven lode claims null and void should be upheld * * *" (Pet. App. 110a). The court sustained the Department's finding. *Id.* at 92a-95a, 98a-110a. The court of appeals affirmed, holding that the district court correctly found that the IBLA's decision was supported by substantial evidence (*id.* at 111a-112a).

3. The decision of the court of appeals is correct and is supported by a long history of consistent administrative and judicial construction of the relevant statutes. It does not conflict with any decision of this Court or of another court of appeals, and accordingly there is no reason for review by this Court.

Petitioner asserts (Pet. 16-20) that the Secretary and the courts applied an incorrect test in determining whether he was entitled to a patent. This contention is wholly without merit. To establish a "discovery" entitling him to a patent, a mineral lode claimant is required to expose physically, within the limits of his claim, a vein or lode of mineral bearing rock in place, which possesses in and of itself a present or prospective value for mining purposes. Speculation or hope of the existence of minerals have repeatedly been held insufficient to obtain a patent. See, *e.g.*, *United States* v. *Coleman*, 390 U.S. 599, 602 (1968).

Petitioner points to nothing that suggests that the correct standard was not applied.[2] Nowhere does the record support a finding that petitioner has actually found a deposit upon which to predicate development. Petitioner himself has admitted that, with the exception of his Leo No. 3 claim, he would need to do further prospecting before he would have reasonable prospects for success in developing a mine (1966 Tr. 324-327). His expert witness, William Crawford, testified that Turkey Track No. 3 required more prospecting (1966 Tr. 256). This testimony demonstrates that the agency and the courts below did not deviate from the established standard in rejecting petitioner's claims. This Court has made clear that evidence showing a "possibility" that land contained minerals sufficient to make it "chiefly valuable therefor" is not enough to satisfy the mining law. See *Chrisman* v. *Miller*, 197 U.S. 313, 323 (1905). A discovery under the mining law is shown by reference to a "prudent mine developer," not a "prudent prospector." *Barton* v. *Morton*, 498 F.2d 288, 291 (9th Cir.), cert. denied, 419 U.S. 1021 (1974).

In short, there is no basis for contending here that the Secretary and the court applied anything other than the well recognized standard for assessing mineral patent claims. To the extent petitioner is asking this Court to reweigh the evidence in this case under the substantial evidence test (see Pet. 20-22), he clearly presents no issue warranting further review. See *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 507 (1978); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

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[2]Indeed, the language from *Castle* v. *Womble*, 19 Lands Dec. 455 (1894), that petitioner claims was erroneously relied on below appears to be the same as the language that petitioner claims represents the correct standard. See Pet. 16-17.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1984

DOJ-1984-04

Number 83-1405

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Hiram B. Webb, Petitioner,

v.

United States of America, Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petitioner's Reply Brief

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Table of Contents

Table of Authorities

IN THE SUPREME COURT OF THE UNITED STATES

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United States of America

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner's Reply Brief

Statement of the Case

In this reply a restatement of the case is incumbent upon petitioner due to important omissions, errors and irrelevancies in Respondent's Memorandum in Opposition.

Omission

Respondent omits the fact that two of the claims, Leo #1 and Leo #3, were evaluated by the Bureau of Land Management (BLM) in 1956 and left unchallenged. Those two claims were "clear-listed" by the Respondent's mineral examiner, but the implied

validity of such a listing for purposes of possessory title has been so successfully ignored in proceedings below that both the Ninth Circuit Court's remand of Sept. 8, 1981 and the Federal District Court's consequent Order on Nov. 9, 1982 stated the status of two mining claims herein, Leo #1 and Leo #3, falsely. Both courts alleged that the 1956 complaint by Respondent was against seven lode claims including the Leo #1 and the Leo #3.

Classification Order 52, under the provisions of the Small Tract Act of June 1, 1938 (as amended), exempted valid mining claims from reclassification for residential lease and sale. On March 2, 1956, and again on April 19, 1956, BLM mineral examiner Donald Reed visited the claims and subsequently filed his report. On the basis of that report, Respondent challenged only five of the claims herein - the Leo #2 and #4, the Alta Vista #1 and #2 and the Turkey Track #3, as well as other of Petitioner's claims in the area.

Respondent's charges alleged "That minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery." In his decision of December 23, 1957, the hearing examiner dismissed the charges against the five claims herein, but

the Lora, Minnie, Victor and Turkey Track #1 lode claims were invalidated.

In the context of the Reclassification Order, a dismissal of charges of invalidity is validity so far as it concerns possessory title to mining claims subject to the paramount title of the United States; and all seven of Petitioner's claims herein were validated by the clear listing or by the decision of the hearing examiner, December 23, 1957. The decision reads:

> Since the contestant's charges against the Alta Vista No. 1, Alta Vista No.2, Leo No. 2, Leo No. 4 and the Turkey Track No. 3 Lode Mining Claims are not supported by a preponderance of the evidence, those charges must be, and they are hereby, dismissed.

Error

Evidence of the placer deposit on the mineral property in question was not first asserted in 1978 after Respondent brought its Action of Ejectment (memorandum in opposition, page 3). On three occasions evidence of the Petitioner's placer mining operation has been submitted: (1) Deposits of granite and the existence of diggings into the granite were noted by mineral examiner Donald F. Reed in his report and in his testimony in the 1956 hearing;

(2) At the 1966 hearing to consider the patent application for Petitioner's lode claims, petitioner attempted to counter accusations that no mining was taking place on his claims by introducing evidence of a placer discovery. Even though Petitioner had built and maintained good roads for heavy equipment to mine the Turkey Track #3 (pages 307-306, 1966 hearing transcript), Respondent's witness concluded that the Turkey Track #3 pit had been dug purely to expose the vein of gold ore (page 33, 1966 transcript). Other evidence of granite mining was likewise disregarded (page 71, 77, and 79, 1966 transcript);

(3) Evidence of the granite mining operation was also submitted to the Federal District Court with the Petitioner's 1978 amended answer and counter-complaint.

Petitioner has survived as a small operator in the mineral industry because during times of low gold prices, he was able to continue exploring and developing his gold deposit on his claims by mining the granite. The court below is upholding a nullification of lode claims which depended for their viability on an integrated

system of mining the granite while developing the gold, be it lode or placer, under legal definition. Petitioner's granite production, deemed to be a placer deposit (pages 207-212, 1956 transcript), was not allowed to support a patent application for lode claims. No other patent application has been made on Petitioner's mining property; yet the courts below have ordered the Petitioner be evicted from the property necessary to his mineral production due to the rejection of his lode patent application.

The mining laws offer a remedy for overcoming such technicalities of the law as lode and placer distinctions represent in the case before the bar. Petitioner attempted to raise the pertinent statute to the eyes of the court when Petitioner responded with an amended answer and counter-complaint to Respondent's motion for summary judgment in the action for ejectment in the Federal District Court for Arizona. Petitioner asserted his property right under 30 USC Section 38 which provides:

> Where such person or association, they and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or the territory where the same may be situated. Evidence of such possession and

> working of the claim for such period shall be sufficient to establish a right to a patent thereto under this chapter.

Upton vs. Santa Rita Mining Company, 14, N.M. 96, 89, P. 275, 283 (1907), interprets Section 38 in terms particularly appropriate to the case here in petition:

> ...Proof of possession for the statutory period in the absence of any adverse claim was to be taken by the land department as equivalent to an establishment in detail of all facts necessary to constitute a valid location.

U.S. vs. Haskins, 505 F.2d, 246-253, October 25, 1974; Springer vs. Southern Pacific Co., 248 P. 819-824; Newport Mining Co. vs. Bead Lake G.C.M. Co., 1920, 110 Wash. 120, 188, P. 27; Altuna Quicksilver Mining Co. vs. Integral Quicksilver Mining Co., 114 Cal. 100, 45, P. 1047; Lavagnino vs. Uhlig, 26 Utah, 1, 71 P. 1046, 99 Am. St. (Rep.) 808; and Humphreys vs. Idaho Gold Mines, etc., Co., 21 Idaho, 126, 120 P. 823, 40 L.R.A. (N.S.) 817; all of the forgoing case law interprets 30 USC Section 38 to favor the validity of Petitioner's mining claims. The courts have liberally interpreted 30 USC Section 38 to allow mining claimants to overcome the technicalities which Respondent uses to nullify Petitioner's property rights and to take the land of Petitioner's mining claims without compensation.

Irrelevancy

At page 3 of its memorandum in opposition, Respondent points out that Petitioner did not ask for judicial review of the IBLA's "final" 1970 decision. We direct the court to the Ninth Circuit Court's remand in U.S. vs. Webb, No.79-3484, decided Sept. 8, 1981, which states:

> There is no statute of limitations for judicial review of an administrative decision by the Department of Interior's Board of Land Appeals in a federal mining laws proceeding; thus a BLA decision is ordinarily reviewable in a subsequent action for ejectment regardless of how much time has elapsed subject to rules of pleading which the Federal Rules of Civil Procedure impose and to general principles of estoppel.

Argument in support of Question No. 1:

Did the Department of the Interior and the lower courts apply an incorrect test of discovery on an unpatented mining claim.

The decision of the court of appeals is incorrect in allowing the Respondent to confuse the difference between the test of validity for possessory title to a mining claim subject to the paramount title of the United States, and the criteria by which the Respondent gives up its real title through patent. Despite the

premise of Respondent's opposition, Petitioner does not seek review of the long history of consistent administrative and judicial construction of relevant statutes which entitle Petitioner or any other mining claimant to a patent. The Petitioner does not seek a patent in its petition to this court nor is Petitioner challenging tests used by Respondent in determining whether Petitioner was entitled to a patent. Petitioner recognizes that those tests are justly more demanding than the legal requirements for a claimant continuing his possessory rights on an unpatented mining claim.

The sole statutory authority for mining claims is that "all valuable mineral deposits in lands belonging to the United States...shall be free and open to exploration and purchase..." 20 USC Section 22 (1872). Court enunciation of that statute has long established: "(V)alue, in the sense of proved ability to mine the deposit at a profit need not be shown." Adams v. U.S., 318 F.2d 861 (9th Cir. 1963). The so-called "marketability test" devised in the 1950's for application to discovery of common varieties of mineral such as sand and gravel has gradually found its way into general use to test mineral discovery without regard to variety

of mineral or whether the claimant is seeking patent. This development flys in the face of warnings from the courts such as in Book v. Justice Min. Co., 58 F.106 (D. Nev. 1893):

> If this theory were adopted by the courts it would invalidate many mining locations. Moderately carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place, bearing gold or silver, which he had discovered, would pay all the expenses of removing extracting, crushing, and reducing the ore, and leave a profit to the owner...

Attempts by the Respondent to enlarge the application of the marketability test have encountered the proscription of the courts even more recently as in McClarty v. Secretary of Interior (9th C.A. 1969) 408 F.2d 907, 908; and Verrue v. United States, (9th C.A. 1972) 457 F.2d 1202.

Eureka Consolidated Mining Co. v. Richmond, CCC. Nev. 1877, 4 Sawy 302, 8 F.Cas. 819, sets forth that the mining laws "were formed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose." Variously those laws have been interpreted to allow that cessation of the operation of a mine may be caused by innumerable

factors totally beyond the bona fide intentions of the operation, Charlestone Stone Co. v. Andrus, No. 75-1532, U.S. Ct of Appeals, 9th Cir., May 12, 1977; to allow that a favorable showing of bona fides in development is recognized as one of the factors which can serve to demonstrate the marketability of a mineral from a particular deposit, U.S. v. Harenberg, 9 IBLA 77 (1973); and to allow that the long history of actual profitable mining operations are the best evidence of a valuable mineral deposit, U.S. v. McKenzie, 4 IBLA 97 100 (1971).

The mining laws are to be construed "in the light of the general purpose and policy which Congress had in view, namely, the protection of bona fide locators of the mineral lands of the United States, and the development of the mineral resources of the country." Henderson et al v. Fulton, 35 L.D., 652. As Stockley v. United States, 260 U.S. 532 (1923) at 539 points out:

> A change in the practice of the Land Department manifestly could not have the effect of altering the meaning of an act of Congress. What the act meant upon its passage it continued to mean thereafter.

When the Appellee nullifies mining claims for which it will not issue patent, it exceeds its

authority on two counts (1) the patent applicant is never advised in the contest against his claims of what is the modicum of proof differentiating a valid location from a patentable claim and is thereby denied due process; and (2) the present requirements imposed by the Respondent in order to win a patent constitute a marketability test which has never been demanded of a valid location; East Tintic Consolidated Mining Co. (1914) 43 L.D. 79:

> (T)he purpose of the discovery requirement was to prevent frauds on the Land Office; and not to prevent man from protecting himself by locating his claim before he has done the expensive exploration of the depths of his deposit. Lange v. Robinson, (C.A. 9, 1906), 148 F.799.

The courts have held that an "exploration" for mineral may be had following "discovery" Charlton v. Kelly, 156 F. 433; Lange v. Robinson supra. Certainly every development includes an exploration for more mineral, while added information and knowledge gained through exploration is a further development of a mineral property and increase in the value thereof. "(S)o long as the locator or his assignee performs the required amount of work, his right of possession is exclusive. . ."according to Reed v. Munn, 8th Circuit,

148G 737, 557, cert. den. 202 US 588. United States v. Detroit Timber and Lumber Co., 200 US 321, agrees.

Respondent asserts that Petitioner forfeited his claims because his patent application was rejected. Why Petitioner's failure to patent constitutes a forfeiture of his claims is not clear, particularly when his claims were validated by the BLM in a previous hearing not involving a patent application. "Forfeitures have always been deemed in law odious, and courts have universally insisted upon the forfeiture being made clearly apparent before enforcing it." Barringer & Adams, 1897, The Laws of Mines and Mining. 301; Mt. Diablo M & M Co. v. Callison, 5 Sawy. 439 (1897) C.C.D. Nev. Furthermore:"(M)ining statutes are to be liberally construed, especially when it is sought to forfeit claim." Inman v. Olson, 320 P2 1043 (1958).

CONCLUSION

For the reasons stated in this reply and in the petition, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I am a member of the Supreme Court of the United States Bar; that I am appearing on behalf of Hiram B. Webb, Petitioner in this matter and that three copies of the foregoing Reply have been served upon all appropriate parties by depositing the documents in a United States post office, first-class postage prepaid, this 3rd day of May, 1984, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Department of the Interior
18th and C. Streets, N.W.
Washington, D.C. 20240

Hale C. Tognoni

Hale C. Tognoni,
Attorney for Petitioner

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

Subscribed and sworn before me this 3rd day of May, 1984.

Marlene L. Brunger
Notary Public